Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

S. MARTIN GORDON; ERIC OLE THORSEN and JOEL J. FLICK,

Petitioners,

vs.

THE COUNTY OF ROCKLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the First Amendment protect assistant county attorneys from patronage dismissal where a jury expressly concluded that their political party affiliation bore no relevance to the discharge of their non-policymaking duties?

2. Where a jury expressly found that plaintiffs, assistant county attorneys, were terminated in violation of the First Amendment's prohibition against patronage dismissals because their political party affiliation bore no relevance to effective job performance, may the Circuit Court properly vacate the judgment on the ground that their *ideology* made a difference in the implementation of government programs?

3. Should a fact finder resolve a political patronage case by considering the plaintiff's actual *and* inherent job duties?

4. Should the district court or the jury resolve whether a plaintiff's job duties require the performance of policymaking functions sufficient to exempt the incumbent from the First Amendment's prohibition against patronage dismissals?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case, except for C. Scott Vanderhoef and Paul Nowicki, who were initially named as defendants. The parties stipulated them from the case in the course of trial.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, S. Martin Gordon, Eric Ole Thorsen and Joel J. Flick, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The Court of Appeals' opinion is reported at 110 F.3d 886 (2d Cir. 1997) and is reproduced in the Appendix at App.1. The district court did not issue a written opinion. The district court's amended judgment is filed herewith at App. 14. The district court's civil judgment vacating the judgment and amended judgment is filed herewith at App. 16.

JURISDICTION

The Court of Appeals entered its judgment on March 27, 1997. Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the date of entry. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The First Amendment to the United States Constitution reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; nor the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Pursuant to 42 U.S.C. § 1983, petitioners commenced this action following their termination from the Rockland County Attorney's Office. (A-15-19). Petitioners, Democrats, alleged, *inter alia*, that respondent, through the County Executive, C. Scott Vanderhoef, and the County Attorney, Paul Nowicki, both Republicans, terminated them in violation of the First Amendment. (A-18). Petitioners prevailed at trial as a jury expressly concluded that (1) respondent terminated them because of their political affiliation and (2) "party affiliation [was] not an appropriate requirement for the effective performance of that plaintiff as defined by the Court." App. 19. The jury awarded petitioners a total of $197,000 in damages. On appeal, the Second Circuit held that *Elrod-Branti* did not protect petitioners from patronage dismissal and effectively precluded government attorneys from challenging their terminations as politically-motivated.

Facts adduced at trial

a. Petitioners' terminations

In early 1994, respondent, through Nowicki and Vanderhoef, both Republicans, terminated petitioners from their positions as assistant county attorneys. Petitioners are Democrats. Several months earlier, Vanderhoef took office after defeating an incumbent Democrat. Vanderhoef appointed Nowicki as county attorney. On appeal, respondent has not challenged the jury's conclusion that petitioners were terminated for political reasons.

b. Petitioners' job duties

The evidence reflects that (1) petitioners held non-policymaking positions and exercised minimal discretion and (2) party affiliation bore no relevance to their effective job performance.

Assistant county attorneys neither interfaced with the media (SA-171-72, 175)[1], determined the course of litigation (SA-176), made policy (SA-180, 205) nor asserted policy positions without the County Attorney's approval. (SA-178, 181, 186-87). They had limited contact with elected officials and only in the County Attorney's name. (SA-180-82).

Upon assuming office, Nowicki retained Patricia Zugibe as his deputy county attorney and another Democrat as his confidential secretary. (SA-199, 243-44, 330-31).

The County Attorney's office cannot initiate litigation without direction from the executive or legislative branches. (SA-163).

Nowicki did not assign petitioners job duties when he became County Attorney. (SA-294-95). Petitioners never refused a job assignment or gave Nowicki any basis to believe

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[1] Factual citations refer to either (SA-) or (A-), the supplemental appendix and appendix on appeal, respectively.

their ideology or politics would affect their job performance. (SA-371-72). Petitioners lacked authority to hire or fire employees. (A-33, paras. 3, 5, 6).

S. MARTIN GORDON

In 1978, Gordon commenced part-time employment with the Rockland County Attorney's office. (SA-34). He was assigned to provide legal counsel to the Rockland County Sewer District No. 1 and "implement[ed] the legislative direction to the sewer agency" as detailed in "Resolutions." (SA-35, 38). Until his termination in March 1994, Gordon counseled the Commission by preparing and monitoring contracts, supervising condemnations, reviewing title policies and preparing deed easements. (SA-39, 42). He never made policy for the Commission (SA-42, 57, 174), the members of which usually did not vote along party lines. (SA-40-41).

Jules Graifman headed the Commission when Gordon counseled it. (SA-43). He neither requested Gordon's opinion on policy nor his input as to how the Commission should expend resources. (SA-43-44). In his 16 years as counsel to the Commission, it addressed no "political matter[s]." (SA-44). Gordon never recommended that the Commission pursue a particular direction and its members did not expect him to do so.(SA-67).

While Gordon met with the sewer district director and contractors to discuss claims and other problems affecting a project, only the Commission determined to settle claims. (SA-55-56, 84). If Gordon thought the Commission should settle, he conferred with the County Attorney before so advising it.(SA-85).

Moreover, the Sewer Commission advised the Sewer District which easements and takings were needed for a sewer project. (SA-82). If the County's real estate department determined that it could not negotiate a settlement, the Commission directed Gordon to commence an eminent domain proceeding. *Id.*

In the several years before his termination, Gordon handled no major litigation for the Commission. (SA-47). He neither publicly spoke for the Commission nor interfaced with the public. (SA-47-48, 52). Public officials did not ask him to further their political agendas. (SA-48).

ERIC OLE THORSEN

Thorsen commenced employment with the County Attorney's office in 1980 as a full-time attorney (SA-110-111), assuming a part-time role in 1993. (SA-113).

Thorsen neither spoke with the media nor represented his departments at public meetings. (SA-136, 175). He never interacted with the public. (SA-136-37). County officials did not ask him to take positions to reflect their political objectives. (SA-137).

Thorsen represented the County Highway and Parks Departments and the County Drainage and Planning Agencies. (SA-114). The appointed commissioners of these agencies (SA-137-38) never asked Thorsen for input on policy direction and he volunteered none. (SA-124).

Under direction from the County Attorney and Executive, Thorsen commenced eminent domain proceedings for the Highway Department. (SA-116). The County Legislature determined which parcels to acquire. (SA-117).

Thorsen also prepared contracts for County highway projects. (SA-116). He did not help select the contractors. (SA-117-18, 135-36).

In addition, Thorsen gave the Highway Department "certain legal advice. If there was a question as to whose responsibility an intersection was, whether it was a town responsibility or a county responsibility, I would be given direction by the County Attorney to research that and report back to him. Outside of general lawyering, ... nothing else." (SA-118-19). Thorsen did not contact elected officials on Highway Department issues. (SA-123). He "wasn't involved" in the political process that affected which highways the

County selected for improvement. (SA-135). He did not help decide how to allocate the Highway Department's resources. (SA-135).

The County Planning Agency "is largely concerned with further growth in Rockland County, and making certain that we block out areas for parks and how County property is to be developed in the future." (SA-119). As counsel to the agency, Thorsen never recommended which (or how much) properties the County should reserve for parklands or their location. (SA-119-20). The legal questions that planning and parks officials asked usually concerned whether someone was committing a crime on County property and what to do about trespassers. (SA-120-21).

Thorsen did not make policy on drainage and stream issues. (SA-122-23). He had no direct contact with elected officials about matters affecting the Drainage Agency. (SA-123).

JOEL J. FLICK

In 1992, Flick commenced part-time employment as the assistant county attorney assigned to the Community Development Agency. (SA-210, 230).[2] In the course of this litigation, respondent purported to cite Flick's job description. However, it was not introduced at trial, and, in opposition to respondents' summary judgment motion, Flick attested that he never saw the document and it was not his job description. (A-113-114 paras. 13-16). His real job description required him to ensure that local contracts comply with federal rules and regulations. (A-113 at para. 13). The director of the Office of Community Development advised the County Attorney that Flick should only handle Community Development work. (SA-215).

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[2] On respondent's summary judgment motion, Flick attested that this newly-created position was created to represent the Community Development Office. (A-111, para. 8). The Federal government paid Flick's salary. (A-111, para. 4).

Flick ensured that local contracts governing the use of community development block grants satisfied federal mandates on handicap accessibility, nondiscrimination and environmental safeguards. (SA-211-12, 214). A local consortium, not Flick, determined how to spend the federal money. (SA-212-13). Without Flick's input, the municipalities set up a bidding process to select the contractors. (SA-213-14). Flick was excluded from the consortium's meetings and its members never requested his legal advice. (SA-218).

Flick exercised no discretion when reviewing contracts and occasionally used government templates. (SA-214). *See also*, (SA-217: "[m]ost of my work ... didn't really take any decision-making or anything that I would have to discuss with [the county attorney]"). He testified, "[i]t wasn't my decision [as to whether local contracts conformed with federal law], it was a book that I went by." (SA-268).

If a municipal attorney forwarded Flick a community development contract that omitted a clause required by the federal government, he would advise the attorney that "[i]f they want the money from the Federal Government, they will include these clauses. It wasn't we'll work at some kind of compromise. ... I was just a messenger. ... I enlightened them of the Federal rules." (SA-233-34).

Flick was never asked to draft rules governing the distribution of federal money. (SA-224). He did not supplement the federal requirements with his own criteria. (SA-264).

Prior proceedings

Petitioners prevailed at trial. In a special verdict form, the jury found that respondent terminated them because of their political affiliation. The jury also found that the terminations were unconstitutional because "party affiliation was [not] an appropriate requirement for the effective performance of the public office of that plaintiff as defined by the Court." App. 19. The jury awarded petitioners a total of $197,000 in damages.

The Second Circuit vacated the district court judgment. Relying principally on three circuit precedents, *Savage v. Gorski*, 850 F.2d 64 (2d Cir. 1988), *Regan v. Boogertman*, 984 F.2d 577 (2d Cir. 1993) and *Vezzetti v. Pellegrini*, 22 F.3d 483 (2d Cir. 1984), and inter-circuit cases that did not extend First Amendment protection to municipal attorneys, the Court reviewed the record *de novo* and concluded, "each of the three plaintiffs served as a liaison and advisor to a policymaking commission. It is difficult to fathom how such responsibilities can be undertaken and done well without their "political or social philosophy [making] a difference in the implementation of programs." App. 10 (*citing Savage*, 850 F.2d at 69). The court also stated, "[i]t is, in our view, a fair conclusion that the Assistant County Attorneys here, because of their authority to act on behalf of the County, are politically accountable to the Legislature and the County Executive such that their loyalty helps ensure that the mandate of the electorate is effectively carried out." *Id.* at 12-13.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to resolve splits between the circuits on four important issues respecting the First Amendment's general prohibition against patronage terminations. Granting this writ would also settle an important issue left open by this Court 17 years ago when it determined that the First Amendment protected assistant public defenders from patronage dismissals: whether the First Amendment also protects municipal attorneys from politically-motivated termination. As the broad scope of the Second Circuit's decision effectively precludes First Amendment challenges by government attorneys, this Court should settle that issue.

In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court set forth a multi-faceted test to determine when the First Amendment prohibits patronage dismissal: "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an

appropriate requirement for the effective performance of the public office involved." *Id.* at 518.

Since *Branti*, the circuit courts have applied various tests to determine when the First Amendment protects public employees. Consistent with *Branti*, some Circuits have held that a municipal employer may terminate an employee if *party affiliation* relates to effective job performance. *See, Peters v. Delaware River Port Authority of Pennsylvania and New Jersey*, 16 F.3d 1346, 1354 (3d Cir. 1994). Others, including the Second Circuit, have allowed patronage dismissals where *partisan political concerns* do not relate to successful job performance. *See*, *Jiminez Fuentes v. Torres Gaztambide*, 807 F.2d 235, 249-50 (1st Cir. 1986); *Savage v. Gorski*, 850 F.2d 64, 48 (2d Cir. 1988). A recent Eleventh Circuit case has aptly identified this inter-circuit split. *Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996). In this case, the Second Circuit applied its broad test and cited respondent's need for loyal assistant county attorneys to effectuate the electoral mandate. App. 12-13.

Moreover, the Second Circuit applied other procedural and doctrinal tests that stand ripe for Supreme Court review in light of the inter-circuit split governing the proper resolution of patronage cases. Unlike the Eleventh Circuit, the Court of Appeals only considered the duties inherent in petitioners' positions, not their actual job functions. *See*, *Parrish v. Nikolits*, *supra*. Fairly read, *Branti* compels the consideration of all aspects of a public employee's job duties. *See*, 445 U.S. at 518. Moreover, in reviewing the record *de novo* and vacating the jury verdict on the basis of disputed factual conclusions, the Second Circuit parted ways with those circuits which view the *Branti* test as one of fact, not law. *See, Bauer v. Bosley*, 802 F.2d 1058, 1062 (8th Cir. 1986). This Court has not addressed that issue.

Finally, certiorari is warranted to resolve a question this Court left open in *Branti*: whether the First Amendment protects government attorneys from patronage dismissal. Citing the kind of job responsibilities common to nearly all

government attorneys, the Second Circuit's sweeping decision effectively creates a *per se* rule that denies them First Amendment protection. In doing so, the court contradicted a Ninth Circuit decision that refused to apply a *per se* rule disallowing assistant prosecutors from challenging politically-motivated personnel decisions. *See, Finkelstein v. Bergna*, 924 F.2d 1449 (9th Cir. 1991).

POINT I

THIS COURT SHOULD RESOLVE THE IMPORTANT PUBLIC ISSUE WHICH IT LEFT OPEN IN *BRANTI v. FINKEL*: WHETHER THE FIRST AMENDMENT PROTECTS ASSISTANT COUNTY ATTORNEYS FROM PATRONAGE DISMISSAL

In holding that the First Amendment did not protect petitioners from patronage terminations, the Second Circuit resolved an issue that this Court left open in *Branti v. Finkel*, 445 U.S. 507 (1980). In that case, this Court held that the Rockland County public defender, a Democrat, could terminate Republican assistant public defenders because of their political party affiliation.

This Court should settle the important question as to whether assistant county attorneys deserve Constitutional protection from patronage dismissals. Sup.Ct. Rule 10(c). The Second Circuit's broad opinion effectively forecloses nearly all municipal attorneys from First Amendment protection, including low-level attorneys like petitioners who performed ministerial functions and exercised discretion so minimal that their political party affiliation or ideology bore no relation to effective job performance. The court noted that, like all municipal attorneys, petitioners had technical competence and expertise and represented their employer. And, although the jury expressly concluded that petitioners' "party affiliation was [not] an appropriate requirement for the effective performance of the public office" (App. 19), the Second Circuit conclusorily held that "[i]t is difficult to fathom how [functioning as a liaison and advisor to a policymaking commission] can be undertaken and done well without their

'political or social philosophy [making] a difference in the implementation of programs.'" App. 10 (first modification supplied) (citation omitted).

The assumption that even low-level municipal attorneys assume inherently confidential and policymaking functions ignores this Court's instruction that "[a] government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain *high-level* employees on the basis of their political views." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74 (1990) (citations omitted) (emphasis supplied). It also ignores *Branti*'s counsel that mutual confidence and trust can exist between attorneys of competing political parties and, "[t]o the extent that [a municipal employer] lacks confidence in the assistants he has inherited from the prior administration for some reason other than their political affiliations, he is, of course, free to discharge them." 445 U.S. at 520 n.14.

Accordingly, this Court should resolve the important public issue as to whether assistant county attorneys deserve First Amendment protection from patronage terminations where their political party affiliations bear no relevance to effective job performance. Sup.Ct. Rule 10(c).

POINT II

IN HOLDING THAT THE FIRST AMENDMENT DID NOT PROTECT PETITIONERS FROM POLITICALLY-MOTIVATED TERMINATIONS, THE SECOND CIRCUIT CONSIDERED WHETHER SHARED *IDEOLOGY* BORE ANY RELATION TO EFFECTIVE JOB PERFORMANCE, A LEGAL STANDARD THAT THIS COURT HAS NEVER ENDORSED AND OTHER CIRCUITS HAVE REJECTED

In holding that the First Amendment did not protect petitioners from patronage dismissals, the Second Circuit applied a legal standard that this Court has never endorsed and other circuits have rejected. Certiorari is proper to settle an

inter-circuit conflict and correct the Second Circuit's misapplication of this Court's precedent. Sup.Ct. Rule 10(a)(c).

In *Branti*, this Court articulated the legal standard implementing the First Amendment's prohibition against patronage dismissals. The government generally cannot condition public employment on political party affiliation. However, in limited circumstances, the First Amendment permits politically-motivated termination. 445 U.S. at 515-17 (c*iting Elrod v. Burns*, 427 U.S. 347 (1976)). This Court stated:

> In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that *party affiliation* is an *appropriate requirement for the effective performance of the public office involved. Id.* at 518 (emphasis supplied).[3]

Branti held that "it is manifest that the continued employment of an assistant public defender cannot properly be conditioned *upon his allegiance to the political party in control of the county government*." *Id.* at 519 (emphasis supplied).

Critically, *Branti* expressly rejected the position that the First Amendment authorizes patronage terminations when the decisionmaker "needs to have absolute loyalty in his subordinates," stating, "We cannot accept the suggestion that there cannot be mutual confidence and trust between attorneys, whether public defenders or private practitioners, unless they are both of the same political party. To the extent that

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[3] This Court recently re-affirmed that standard. *See, O'Hare Truck Service, Inc. v. City of Northlake*, ___ U.S. ___, 116 S.Ct. 2353, 2355 (1996) ("Government officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question") *(citing Elrod v. Burns, supra*, and *Branti v. Finkel, supra*); *id.* at 2357 ("in *Branti v. Finkel, supra*, we reaffirmed *Elrod*'s common holding and said government termination of a public employee on account of his political affiliation brings our unconstitutional conditions into play").

petitioner lacks confidence in the assistants he has inherited from the prior administration for some reason other than their political affiliations, he is, of course, free to discharge them." 445 U.S. at 520, n.14. *See also*, *Rutan*, 497 U.S. at 74 ("A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain *high-level employees* on the basis of their political views") (citations omitted) (emphasis supplied).

In *Savage v. Gorski*, 850 F.2d 64 (2d Cir. 1988), the Second Circuit reformulated *Branti* to permit personnel decisions motivated by "ideology" as opposed to political party affiliation. *Savage* stated:

> Read literally, the *Branti* formulation would exempt very few positions from protection — including, it would seem, presidential cabinet officers and United States Attorneys. *A better interpretation of the language in Branti is to read it as saying that political affiliation is an appropriate requirement when there is a rational connection between shared ideology and job performance*, a reading which would exempt from protection most policymaking and confidential employees, but not — as in the Court's example — a football coach at a state university. *Id.* at 68 (*citing Branti*, 445 U.S. at 518) (emphasis supplied).

Accordingly, the Second Circuit has explicitly departed from this Court's instruction that party affiliation, not ideology (and the related characteristics, confidence, trust and loyalty), should govern the propriety of politically-motivated personnel decisions.[4]

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[4] *Savage* inaugurated a line of decisions in which the Second Circuit has broadly interpreted *Branti*. *See also*, *Regan v. Boogertman*, 984 F.2d 577, 580 (2d Cir. 1993) ("[t]here is no likely circumstance in which a shared ideology is more important than when a elected official appoints a deputy who may act in his or her stead") (citations omitted); *Vezzetti v. Pellegrini*, 22 F.3d 483, 486 (2d Cir. 1994) ("the proper approach is to assess

(Footnote continued)

Enforcing *Savage*, the Second Circuit has articulated factors to consider when resolving political patronage cases. In *Vezzetti v. Pellegrini*, 22 F.3d 483 (2d Cir. 1994), the court stated:

> These factors include whether the employee (1) is exempt from civil service protection, (2) has some technical competence or expertise, (3) controls others, (4) is authorized to speak in the name of policymakers, (5) is perceived as a policymaker by the public, (6) influences government programs, (7) has contact with elected officials, and (8) is responsive to partisan politics and political leaders. This is not an exhaustive list of indicators, nor is any one factor or group of them always dispositive. *The proper approach is to assess all the factors in order to determine whether 'there is a rational connection between shared ideology and job performance.'*" *Id.* at 486 (citations omitted) (emphasis supplied).

The *Vezzetti* factors significantly narrowed *Branti* and created an exception that has now effectively swallowed the rule against patronage dismissals. The first two factors apply to nearly every public employee who holds a non-competitive position and discharges his duties with technical competence. Since New York civil service law protects civil servants from politically-motivated personnel decisions and the performance of many public jobs requires technical expertise, these two factors will nearly always favor the employer's position. The fifth factor contradicts *Branti* because it credits outward appearances, not actual responsibilities, against the employee. *See*, *Branti*, 445 U.S. at 518 ("the ultimate inquiry is not

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all the factors in order to determine whether 'there is a rational connection between shared ideology and job performance'") (citation omitted); *Kaluzcky v. City of White Plains*, 57 F.3d 202, 208 (2d Cir. 1995) ("We use the term 'policymaker' as a 'convenient shorthand' for a government employee who occupies a position for which party affiliation, loyalty or confidence are appropriate") (citation omitted).

whether the label 'policymaker' or 'confidential' fits a particular position").

Critically, the Eleventh Circuit has identified an inter-circuit conflict as to the proper interpretation of *Branti*'s counsel that "the ultimate inquiry is ... whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. In *Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996), the court stated:

> In reading *Branti* this way, we fall into line with those circuits interpreting *Branti* as teaching that party affiliation must be essential to effective performance of a position before an employee holding that position can be susceptible to patronage dismissal. *See Dickeson v. Quarberg*, 844 F.2d 1435, 1443 (10th Cir. 1988); *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984). ... We part ways with those circuits that allow patronage dismissals in policymaking positions that do not directly implicate partisan political concerns. *See Jiminez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 249-50 (1st Cir. 1986); *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985).

Indeed, like the Second Circuit, several other circuits have broadly interpreted *Branti* to permit patronage terminations for reasons other than party affiliation. *See*, *Jiminez Fuentes*, 807 F.2d at 241-42 ("does the position involve government decisionmaking on issues where there is room for political disagreement on goals or their implementation? Otherwise stated, do party goals or programs affect the direction, pace, or quality of governance?"); *Akers v. Caperton*, 998 F.2d 220, 225 (4th Cir. 1993)("we conclude that there is no rational connection between shared ideology and the performance of this low-level job")(c*iting Branti*, 445 U.S. at 518); *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985)("an employee's position is unprotected if, first, there is no room for principled disagreement in the decisions reached by the

employee and his superiors, and, second, he has meaningful input into the decisionmaking process") (citation omitted); *Barnes v. Bosley*, 745 F.2d 501, 508 (8th Cir. 1984) ("the question still remains whether Bosley needed his own political supporters in those positions to insure the smooth functioning of the Clerk's office. ... Like the public defenders in *Branti* and the football coach in the Court's example in that case, these plaintiff's political viewpoints would not influence policymaking in the areas within their discretion").

Contrarily, other circuits have faithfully followed *Branti*. *See*, *Peters v. Delaware River Port Authority of Pennsylvania and New Jersey*, 16 F.3d 1346, 1354 (3d Cir. 1994) ("Absent further direction from the Supreme Court, we will apply the test announced in *Branti*, and consider 'whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved'") (*quoting Branti*, *supra*); *id.* at 1353 ("although '[e]ach decision is ... fact specific for that case,' a question relevant in all cases is whether the employee has 'meaningful input into decision making concerning the nature and scope of a major [government] program'")(citations omitted)(modifications in original); *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993) ("'should a difference in party affiliation be highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office, dismissals for that reason would not offend the First Amendment'") (*citing*, *inter alia*, *Burns v. County of Cambria*, 971 F.2d 1015, 1023 (3d Cir. 1992)(noting that exception for political dismissals is "narrow"); *McConnell v. Adams*, 829 F.2d 1319, 1324 (4th Cir. 1987) ("Party affiliation must be more than a matter of convenience; it must be an appropriate requirement for the position"); *Vojvodich v. Lopez*, 48 F.3d 879, 887 (5th Cir. 1995)("a public employer cannot act against an employee because of the employee's affiliation or support of a rival candidate unless the employee's activities in some way adversely affect the government's ability to provide services"); *Mumford v. Basinski*, 105 F.3d 264, 270 (6th Cir. 1997) ("this circuit recognized the Supreme Court's dictate that, in many circumstances, a public employee may

not be dismissed because of his political beliefs or activities; but a public employer may consider the political affiliation of a current or prospective employee 'if political affiliation was an appropriate requirement for the effective performance of the public office involved'") (citations omitted).

These contradictory tests governing patronage decision-making reflect how the Circuit Courts have inconsistently applied *Branti*. *Branti's* general requirement that municipal employers link party affiliation with effective job performance has invited courts to re-formulate that standard to expand or narrow the First Amendment rights of public employees. One legal commentator has noted that the First and Second Circuits have consciously applied *Branti* narrowly. Susan Lourde Martin, *A Decade of Branti Decisions*, 39 Am. U. L. Rev. 11, 28 (1989) ("The First Circuit's opinions suggest that the court is inclined to keep the *Elrod/Branti* exception as broad as possible, as opposed to extending constitutional protections to more employees. ... *The Second Circuit is openly hostile to expanding the categories of public employees to which Elrod/Branti protection applies*") (citations omitted) (emphasis supplied).

In this case, the Second Circuit applied *Savage* and *Vezzetti* to vacate a jury verdict expressly finding that petitioners were fired in violation of the First Amendment since their political party affiliation bore no relevance to effective job performance. Since these precedents applied the Second Circuit's broad interpretation of *Branti* -- a reading that other circuits have rejected -- a contrary result would have obtained had the court identified party affiliation, not ideology, as the central focus. The Second Circuit adversely applied the *Vezzetti* factors which expressly crystalized the question "whether 'there is a rational connection between shared ideology and job performance.'" *Vezzetti*, 22 F.3d at 486 (citation omitted). It also concluded that petitioners had "to effectuate the policies promised the electorate" and newly-elected county officials needed "trusted advisors and alternates who are directly accountable to" them. App. 12 (*citing Regan*, 984 F.2d at 580). The court added, "Here, the County Attorney is not elected

but rather appointed by the legislature, which is itself elected. Gordon and Thorsen were both directly positioned as alternates to the County Attorney position. In addition, all three plaintiffs advised the Legislature or Commissions set up by the Legislature or County Executive, both of which are elected." *Id.* This reasoning reflects the Second Circuit's departure from *Branti* because it credits respondent's defense that it needed to fire petitioners to obtain loyal assistant county attorneys in whom it could place confidence to effectuate the electoral mandate. App. 12-13.[5] The decision below effectively strips government attorneys from First Amendment protection by citing their general responsibilities to establish (without elaboration) that their ideology can affect government programs. However, as noted, *Branti* expressly rejected the position that the First Amendment authorizes politically-motivated discharges to maintain loyalty, mutual confidence and trust between attorneys.

The trial record establishes that petitioners competently discharged non-policymaking duties. The jury properly found that political affiliation was unrelated to effective job performance. The record reflects that petitioners represented non-ideological commissions or agencies. Indeed, Flick monitored local contracts under Federal, not county, regulations and the County Executive lacked any authority to influence his non-discretionary decision-making. The record supports no inference that petitioners' party affiliation affected their job performances.

Certiorari is proper to rectify the Second Circuit's incorrect legal standard and settle the inter-circuit dispute on the threshold question of when municipalities can terminate public employees because of their protected political party associations. Sup.Ct. Rule 10(a).

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[5] The Second Circuit also credited the County Legislature's designation of petitioner's positions as "policymaking." App. 12. However, this Court has rejected that approach. *See, Branti*, 445 U.S. at 518 ("the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position").

POINT III

IN HOLDING THAT THE FIRST AMENDMENT DID NOT PROTECT PETITIONERS FROM POLITICALLY-MOTIVATED TERMINATIONS, THE SECOND CIRCUIT EXPRESSLY DECLINED TO EXAMINE THEIR ACTUAL JOB DUTIES -- AN APPROACH THAT HIGHLIGHTS AN INTER-CIRCUIT CONFLICT AS TO WHETHER INHERENT *AND* ACTUAL DUTIES CONTROL THE *ELROD-BRANTI* INQUIRY

The Second Circuit opinion reflects an inter-circuit conflict as to whether courts should examine a plaintiff's actual or inherent job duties to determine if the First Amendment bars a patronage dismissal. Certiorari is proper to resolve this split. Sup.Ct. Rule 10(a).

Branti did not expressly state whether courts should examine the plaintiff's actual or "paper" job duties, or both. The circuit courts have split on this issue. In vacating the district court judgment, the Second Circuit sided with circuits that only deem relevant the position's "paper" duties. App. 4 ("the idea that job performance (rather than job description) should control *Elrod-Branti* analysis has been consistently rejected by this court and others") (citations omitted).

At least one circuit has rejected the Second Circuit's narrow approach. In *Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996), the Eleventh Circuit interpreted *Branti* to mean that "[t]he inherent powers and actual job responsibilities of the position involved, and the relationship of the particular position to the elected official, should be part of the analysis" (*citing Terry v. Cook*, 866 F.2d 373, 377-78 (11th Cir. 1989); *Ray v. Leeds*, 837 F.2d 1542, 1544 (11th Cir. 1988)).

Parrish properly interpreted *Branti*. In *Branti*, this Court asked whether political "party affiliation is an appropriate requirement for effective performance of the public office." 445 U.S. at 518. This test implies that courts should examine the

totality of job functions, including actual and potential duties. "Effective performance of the public office" requires the incumbent to satisfactorily discharge all relevant duties, actual or inherent. The Second Circuit's instruction that courts should only consider potential duties contradicts *Branti*.

The Second Circuit would have affirmed the district court judgment had it assessed the totality of petitioners' duties. The district court used a special verdict form which specifically asked the jury whether "the defendants have proved by a preponderance of the credible evidence that such termination was not a constitutional violation because party affiliation was an appropriate requirement for the effective performance of that plaintiff as defined by the Court?" The jury replied in the negative and the record fully supports that conclusion since petitioners held ministerial, non-policymaking jobs that did not require discretionary or political decisionmaking. App. 19. While Gordon and Thorsen had broadly-worded job descriptions, the Second Circuit noted that they "worked on tasks narrower than the broad charge contained in the written description." App. 5.[6]

Since the Second Circuit's failure to examine petitioners' actual job responsibilities demonstrates an inter-circuit split and ignores *Branti*'s instruction that the hiring authority link party affiliation with "effective performance of the public office involved," certiorari is proper. Sup.Ct. Rule 10(a)(c).

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[6] The Second Circuit erroneously concluded that Flick labored under the same job description as Gordon and Thorsen. However, the job description which respondent cited on appeal to establish Flick's duties was not introduced at trial and, in opposition to respondent's summary judgment motion, he attested that he had never seen the document and it did not describe his duties when he worked for the Community Development Agency. He stated that his real job description "requir[ed] only that I ensure that local contracts comply with federal rules and regulations." (A-113-14). Gordon and Thorsen's job descriptions are annexed hereto at App. 21.

POINT IV

IN RULING THAT THE DISTRICT COURT HAD TO RESOLVE, AS A MATTER OF LAW, WHETHER *ELROD-BRANTI* PROTECTED PETITIONERS FROM PATRONAGE DISMISSAL, THE SECOND CIRCUIT HIGHLIGHTED AN INTER-CIRCUIT DISPUTE AS TO WHETHER THAT ISSUE IS ONE OF LAW OR FACT

In reversing the district court judgment, the Second Circuit reviewed the record *de novo* and determined that respondent could terminate petitioners because of their political affiliation. App. 6-7. As respondent appealed from the denial of a motion to vacate a jury verdict, the court's failure to examine the record in the light most favorable to petitioners revealed an inter-circuit split as to whether analysis of *Elrod-Branti* protection is one of fact or law. Certiorari is proper to resolve this conflict. Sup.Ct. Rule 10(a).

The Second Circuit cited cases from other circuits that "assume the issue is one of law, and treat it as such." App. 6. (citations omitted). However, this issue is far from settled. In *Bauer v. Bosley*, 802 F.2d 1058, 1062 (8th Cir. 1986), the court stated, "not only do the parties dispute whether the appropriateness of political affiliation to a particular position is a question of law or fact, but courts themselves have disagreed whether the determination is one of law or fact. Even within this circuit a difference of opinion exists as to the nature of the question" (*citing, inter alia, Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985)). Rejecting the position that judges, not juries, should determine, as a matter of law, whether a plaintiff occupies a policymaking position, the Seventh Circuit stated,

> This is not to say that Mrs. Soderbeck was, as a matter of law, an employee who could not be fired because of her political affiliation. It is to say merely that the question was sufficiently uncertain to be one for the jury to decide. The defendants argue that whether or not an employee exercises a

> policy-making role or is a repository of confidences that make loyalty an essential part of his job description should always be a matter of law, but we cannot agree with this point for which no authority is offered, and which has been rejected in previous cases in this and other circuits. Rightly or wrongly, our system commits the decision of complex as well as simple facts, facts tinctured with legal or policy significance (such as negligence) as well as the who-did-what-to-whom facts that can be found without any instruction in the law, to the jury in cases in which a right to a jury trial is given. *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 288-89 (7th Cir. 1985) (citations omitted).

By reviewing the record *de novo* to conclude petitioners held non-protected positions, the Second Circuit not only deviated from the practice in circuits that frame the inquiry as a factual one; it also vacated a jury verdict that expressly found that "defendants [did not] prove[] by a preponderance of the credible evidence that such termination was not a constitutional violation because party affiliation was an appropriate requirement for the effective performance of the public office of that plaintiff as defined by the Court[.]" App. 19.

The court's *de novo* review of the record predicated a factual conclusion that reversed the district court judgment in light of the broad *Elrod-Branti* test. The court stated, "each of the three plaintiffs served as liaison and advisor to a policy-making commission. It is difficult to fathom how such responsibilities can be undertaken and done well without their 'political or social philosophy [making] a difference in the implementation of programs.'" App. 10 *(citing Savage v. Gorski*, 850 F.2d at 69). However, since petitioners had non-discretionary duties like commencing eminent domain proceedings under a superior's direction and preparing contracts and did not recommend policy choices or help allocate resources, the record supports the jury's contrary conclusion that political party affiliation was unrelated to job performance. Also, Flick did not advise the Community Development

Agency itself; he only ensured that municipal contracts complied with federal rules. While the Second Circuit inferred that Gordon and Thorsen were policymakers because they were alternates to the County Attorney position, the record supports a contrary conclusion: since Nowicki's Democratic predecessor, unlike Nowicki, listed them as assistants, not successors, Gordon and Thorsen were not "in line" to replace the county attorney in the event of incapacity or unavailability. As Nowicki designated Democratic holdovers in sensitive positions, the jury could also conclude that he himself felt that he could meet his needs in a non-political manner and that, therefore, party affiliation was irrelevant to office management and efficiency.[7] *See*, *Horton*, 767 F.2d 471 ("we are aware that the courts disagree whether such determinations are matters of fact or law — and also aware of the implications of this issue for the degree of deference we must pay the district court's determination") (*citing* Fed.R.Civ.P. 52(a)).

Since the Second Circuit's opinion reflects an inter-circuit split as to whether resolution of the *Elrod-Branti* inquiry is one of law or fact, certiorari is proper. Sup.Ct. Rule 10(a).

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[7] This Court has not addressed whether analysis of *Elrod-Branti* protection is one of fact or law. In this case, the Second Circuit cited *Elrod v. Burns*, *supra*, for the proposition that this question is for the court. App. 6. However, in stating that "[t]his involves solely a question of constitutional interpretation," *Elrod* was addressing whether the political question doctrine barred this Court from determining whether the First Amendment prohibits patronage dismissals. This Court stated, "we are asked only to determine whether the politically motivated discharge of employees of the Cook County Sheriff's Office comports with the limitations of the First and Fourteenth Amendments. This involves solely a question of constitutional interpretation, a function ultimately the responsibility of this Court. ... The political question doctrine, therefore, is no obstacle to judicial review in this case." 427 U.S. at 352

POINT V

BY INTERPRETING THE FIRST AMENDMENT TO EXCLUDE PETITIONERS, ASSISTANT COUNTY ATTORNEYS, FROM CHALLENGING THEIR PATRONAGE DISMISSALS, THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH A DECISION OF THE NINTH CIRCUIT

By holding that petitioners, three assistant county attorneys with ministerial job functions, may not challenge as unconstitutional their politically-motivated terminations, the Second Circuit effectively foreclosed government attorneys from *Elrod-Branti* protection. Factors which the Second Circuit considered were the general role government attorneys play (App. 8) and their job descriptions which broadly assigned them "the responsibility of representing the County in court cases and in the performance of other legal work." App. 5, 9, 21. Since this ruling is inconsistent with a Ninth Circuit decision, certiorari is proper. Sup.Ct. Rule 10(a).

In *Finkelstein v. Bergna*, 881 F.2d 702 (9th Cir. 1989), the court initially affirmed the denial of a summary judgment motion on the ground that an assistant prosecutor could not be disciplined solely for exercising his First Amendment rights. The plaintiff did not support his superior's choice to replace him as district attorney. *Id.* at 703. *Finkelstein* noted *Branti*'s prohibition against patronage dismissals where party affiliation bears no relevance to effective job performance. *Id.* at 705. The court also noted that in *Connick v. Meyers*, 461 U.S. 138 (1983), this Court stated that an assistant prosecutor raised a matter of public concern by complaining about "feel[ing] pressured to work in political campaigns on behalf of office supported candidates." *Id.* at 706. The Ninth Circuit concluded,

> From *Connick* we draw two important points. First, Myers' position as an assistant prosecutor was unimportant to the Court's straightforward application of the general rule prohibiting discharge of public employees for exercising first amendment rights.

> Second, the Court made no reference to footnote 13 in *Branti v. Finkel*.[8] *We thus conclude that there is no bar to Finkelstein's first amendment claim due solely to his status as an assistant prosecutor.*" *Id.* at 706 (emphasis and footnote supplied).

The Ninth Circuit withdrew its opinion in *Finkelstein* and issued another decision that affirmed summary judgment on the ground that qualified immunity shielded Bergna from suit because in 1982 it was not clearly established that Finkelstein's termination violated the First Amendment. 924 F.2d 1449, 1453 (9th Cir. 1991). However, the court largely adopted its reasoning in *Finkelstein I* to "reject[] the proposition that prosecutors have unfettered discretion to discipline assistant prosecutors for exercising their first amendment rights." *Id.* The Ninth Circuit's unequivocal position in *Finkelstein II* that no *per se* rule precludes government attorneys from political dismissal represents a clear judicial pronouncement that would undercut a future qualified immunity claim on similar facts. *See, Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (in order for an official to violate clearly established rights, the unlawfulness of the challenged conduct must be apparent in light of clearly established law).

As the decision below clashes with the Ninth Circuit's express refusal to apply a *per se* rule against excluding government attorneys from First Amendment protection, certiorari is proper. Sup.Ct. Rule 10(c).

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[8] In *Branti*, this Court declined to express an "opinion as to whether [a prosecutor's] deputy... could be dismissed on grounds of political party affiliation or loyalty" (citation omitted). 445 U.S. at 519, n.13.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: June 13, 1997
Goshen, New York

Respectfully submitted,

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APPENDIX

Appendix

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1070 August Term, 1996

(Argued February 12, 1997 Decided MAR 27 1997

Docket No. 96-9192

S. MARTIN GORDON; ERIC OLE THORSEN and JOEL J. FLICK,

Plaintiffs-Appellees,

v.

COUNTY OF ROCKLAND, The County of Rockland

Defendant-Appellant,

C. SCOTT VANDERHOEF; PAUL V. NOWICKI,

Defendants.

RECEIVED
MAR 31 1997

Before: JACOBS, CALABRESI, and LAY,* *Circuit Judges*.

The County of Rockland appeals a judgment pursuant to a jury verdict that its termination of three Assistant County Attorneys was politically motivated and violated the First Amendment. The Court of Appeals, Lay, visiting Circuit Judge, holds that the district judge improperly presented the ultimate constitutional question to the jury, and that the

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* Honorable Donald P. Lay, United States Circuit Judge for the Eighth Circuit, sitting by designation.

plaintiffs' termination was not unconstitutional because the plaintiffs were not entitled to First Amendment protection against politically motivated dismissal.

REVERSED.

JOHN D. WINTER, Patterson, Belknap, Webb & Tyler, L.L.P., New York, NY, *for Defendant-Appellant.*

MICHAEL H. SUSSMAN, Sussman, Bergstein, Wotorson and Whateley, Goshen, NY (Stephen Bergstein, Sussman, Bergstein, Wotorson and Whateley, Goshen, NY, on the brief) *for Plaintiffs-Appellees.*

LAY, *Circuit Judge.*

Assistant County Attorneys for the County of Rockland, New York, terminated by the County Attorney in 1994, bring this action pursuant to 42 U.S.C. § 1983, alleging their dismissal was unconstitutional under the First Amendment. The County of Rockland and its individual representatives appeal the court's judgment entered on a jury verdict in favor of the plaintiffs.

Background

When C. Scott Vanderhoef, a Republican, was elected Rockland County Executive in 1993, he appointed Paul Nowicki, also a Republican, as County Attorney. In 1994, Nowicki terminated S. Martin Gordon, Eric Ole Thorsen, and Joel J. Flick, all registered Democrats, from their positions as Assistant County Attorneys. Gordon, Thorsen, and Flick brought this suit against Vanderhoef, Nowicki,[1] and Rockland County, alleging their dismissal was politically motivated and violated the First Amendment.

At trial, the district judge placed two issues before the jury: (1) whether Gordon, Thorsen, and Flick were terminated

[1] The plaintiffs voluntarily dismissed their claims against defendants Vanderhoef and Nowicki.

for political reasons, and (2) whether the termination was a constitutional violation. The jury answered these questions in the affirmative.

The County does not contest the jury's finding that the dismissals were politically motivated. Thus, the sole issue on appeal is whether the plaintiffs are entitled to First Amendment protection. In *Elrod v. Burns*, the Supreme Court concluded that the politically motivated dismissals of employees in the Cook County, Illinois Sheriff's Office were an unconstitutional interference with the employees' First Amendment freedoms of political belief and political association. 427 U.S. 347, 373 (1976). At the same time, the Court observed that such protection did not extend to "policymaking positions." *Id.* at 367. In *Branti v. Finkel*, the Court determined that this exemption extended to confidential employees as well. 445 U.S. 507, 517-18 (1980). The *Branti* Court held that Assistant Public Defenders of Rockland County were not within the policymaker/confidential employee exception, and therefore were entitled to First Amendment protection. *Id.* at 519. It also recast the exception, noting that the focus should be not on the policymaking aspect of a plaintiff's employment, but rather on whether "party affiliation is an appropriate requirement" for effective job performance. *Id.* at 518. The issue thus presented is whether the jobs held by Gordon, Thorsen, and Flick fall within the exception to First Amendment protection crafted by *Elrod, Branti*, and their progeny.[2]

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[2] The plaintiffs argue that, because the County failed to raise its argument that the plaintiffs were political employees not protected by the First Amendment in its motion for judgment as a matter of law, we are foreclosed from considering that argument on appeal. We disagree.

A motion for judgment as a matter of law must "specify the judgment sought and the law and the facts on which the moving party is entitled to make judgment." Fed. R. Civ. P. 50(a)(2). We have thus held that, in making a motion under Rule 50(a), "[t]he moving party must set forth a statement of the specific grounds it relies on for the relief sought. The adequacy of a directed verdict motion is tested by whether counsel observed the specificity requirement of Rule 50(a)." *Samuels v. Air Trans., Local 504*, 992 F.2d 12, 15 (2d Cir. 1993).

(Footnote continued)

Nature of the Positions at Issue

The parties engage in much debate over whether the written job description or the duties actually performed should control. The idea that job performance (rather than job description) should control *Elrod-Branti* analysis has been consistently rejected by this court and others. *See Regan v. Boogertman*, 984 F.2d 577, 580 (2d Cir. 1993) ("[W]e do not merely look at her actions taken while in office. Rather, we also look at the power with which she is vested by law, and which is inherent in the office.") *Williams v. City of River Rouge*, 909 F. 2d 151, 154 (6th Cir. 1990) ("When examining a public office for first amendment protection against politically-motivated dismissal, the relevant focus of analysis is the inherent duties of the position in question, not the work actually performed by the person who happens to occupy the office.") (citations omitted); *Meeks v. Grimes*, 779 F. 2d 417, 419 n. 1 (7th Cir. 1985) ("[O]ur focus is on the 'inherent

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When the County moved for judgment as a matter of law pursuant to Rule 50 (a), it did not mention the *Elrod-Branti* issue to the trial court, arguing instead only that certain named defendants had not been linked to the acts in question and that punitive damages were unwarranted. While the County was so arguing, Judge Brieant intervened and on his own discussed the *Elrod-Branti* issue. The County did not need to press the point further because Judge Briant was aware of it and immediately ruled on it. *See Wilson Sporting Goods v. David Geoffrey & Assocs.*, 904 F.2d 677, 683 (Fed. Cir. 1990) (rejecting the appellee's argument that the appellant had failed to meet Rule 50's specificity argument because "the court cut short counsel's statement, making clear its view that the issue presented a jury question and that it wanted to move on to consider the jury instructions. It would be unfair to require counsel to have developed a statement of evidentiary shortcomings which the magistrate obviously did not want to hear."). Moreover, both the plaintiffs and the court were well aware of the *Elrod-Branti* issue -- it formed the basis for the County's initial summary judgment motion and it was the central issue at trial. Under these circumstances, Rule 50's specificity requirement adds nothing. *See* 5A James W. Moore, MOORE'S FEDERAL PRACTICE, ¶ 50.04 (the purposes of the specificity requirement "are twofold: (1) to assure that the trial court has an adequate basis for its decision; and (2) to afford the adverse party the opportunity to correct any possible infirmities in the proof presented") (footnotes omitted).

powers' of the office, not what any individual officeholder actually does."). Instead, as this authority makes clear, this court's challenge is to discern the *duties inherent* in the offices held by the plaintiffs.

The County's written job description for the position of Assistant County Attorney lists the "distinguishing feature [ ] of the class" as "involving the responsibility for representing the County in court cases and in the performance of other legal work." Each of the plaintiffs, of course, worked on tasks narrower than the broad charge contained in the written description.

Gordon specialized in real property law, and handled Sewer Commission affairs. His duties included negotiating real property purchases and other contracts, assisting the Sewer Commission to implement the wishes of the County Legislature (the Legislature), advising the Sewer Commission on the legality of its actions, handling the origination of the County's electric utility agency, acting as a liaison between the Legislature and the utility companies, and litigating on behalf of the County. Thorsen provided general legal services to the Highway Department, gave legal advice to the County's Planning and Parks Agencies, worked on the acquisition of property, helped prepare contracts for public works, and litigated on behalf of the County. Flick was an attorney in the Office of Community Development, and advised municipal governments within the County as to whether their actions were in compliance with federal law. His written job description includes such duties as representing the County, meeting with municipal officials, and preparing legal documents, including contracts and resolutions.

The essential nature of all three positions encompasses these last three duties. Each attorney was a legal advisor to a particular segment of county government, and represented the County in that capacity. The critical issue is whether these duties warrant First Amendment protection from termination for political affiliation.

Standard of Review

The district judge placed the ultimate constitutional question before the jury; thus, this court must clarify whether analysis of *Elrod-Branti* protection is a question of fact or a question of law. Perhaps *Elrod* itself provides the answer. In discussing the politically motivated discharge of employees from the Cook County Sheriff's Office, the Supreme Court observed, "This involves solely a question of constitutional interpretation, a function ultimately the responsibility of this Court." 427 U.S. at 352. Additionally, in *Ness v. Marshall,* the Third Circuit held that "[w]here, as a matter of law, a person is determined to have occupied a policymaking position, that person's claims to protection from patronage dismissal under *Elrod* and *Branti* are disposable on a motion for summary judgment." 660 F.2d 517, 522 (3d Cir. 1981). And in *Bauer v. Bosley*, the Eighth Circuit held that where the "nonpolicymaking, nonconfidential nature" of the job at issue is clear from the record, the issue is one for the court. 802 F.2d 1058, 1062 (8th Cir. 1986).

Finally, other circuits, including this one, assume the issue is one of law, and treat it as such. For example, in *Vezzetti v. Pellegrini*, this court, affirming summary judgment, examined Vezzetti's position, applying the legal standard de novo.[3] 22 F. 3d 483, 486 (2d Cir. 1994); *see also Regan*, 984 F. 2d at 580 (affirming summary judgment for the employer and engaging in an "independent factual analysis of several factors to determine whether the position falls within the political dismissal exception contemplated in *Branti")*; *Williams*, 909 F.2d at 155 *("Branti* left it to courts to make the case-by-case decision whether a particular government employee qualifie[s] for first amendment protection against politically-motivated dismissal ...."); *Savage v. Gorski*, 850 F. 2d 64, 69

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[3] Plaintiffs' counsel maintained at oral argument that the test this court used in *Vezzetti* is a factual analysis, and is therefore an issue for the jury. We disagree. This argument confuses the idea of an *issue of fact* with that of a *fact-specific inquiry*. We believe the latter accurately characterizes the *Vezzetti* test.

(2d Cir. 1988) (holding as a matter of law that "[t]here are sufficient indicia here to locate all three positions at the policymaking end of the Erie county government spectrum"); *Jiminez Fuentes v. Torrez Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1986) (en banc) ("[The] court's function, it seems to us, is to do what courts are often called upon to do — to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served.").

Under these principles, this court reviews de novo the constitutionality of the dismissals at issue here.[4]

First Amendment Analysis

The Supreme Court in *Branti*, considering the relative merits of exempting the public defenders from First Amendment protection, emphasized two characteristics of the public defenders' jobs important to its decision. First, a public defender's duty "is not to the public at large," but instead "to serve the undivided interests of his [individual] client[s]." 445 U.S. at 519 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 204 (1979)). Second, the confidential information to which a public defender is privy arises "out of various attorney-client relationships, [and] has no bearing whatsoever on partisan political concerns." *Branti*, 445 U.S. at 519. The Court explicitly noted that its conclusion as to public defenders "is in contrast to the broader public responsibilities of an official such as a prosecutor." *Id.* at 519 n. 13 (citing *Newcomb v. Brennan*, 558 F.2d 825, 830-31 (7th Cir. 1977) (upholding the politically motivated dismissal of a deputy city attorney against a First Amendment challenge)). The positions at issue here are of a different nature than that of a public defender. Gordon, Thorsen, and Flick had as their client not individuals, but the County. In addition, they were privy to confidential

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[4] We conclude the district court erred in submitting the issue to the jury. However, this procedural flaw should not detain us, since we review the court's judgment, which impliedly at least, upholds as a matter of law the jury's determination that the plaintiff employees were protected under the First and Fourteenth Amendments.

information held by elected officials, and charged with implementing the policy of those officials.

Our test applying the principles set forth in both *Elrod* and *Branti* has grown from a general standard to a list of specific factors courts should consider. In *Savage*, we interpreted *Branti* to mean that "political affiliation is an appropriate requirement when there is a rational connection between shared ideology and job performance." 850 F.2d at 68. In *Vezzetti*, we applied eight factors to determine that the plaintiff, a Superintendent of Highways, was not entitled to First Amendment protection.

> These factors include whether the employee (1) is exempt from civil service protection, (2) has some technical competence or expertise, (3) controls others, (4) is authorized to speak in the name of policymakers, (5) is perceived as a policymaker by the public, (6) influences government programs, (7) has contact with elected officials, and (8) is responsive to partisan politics and political leaders.

22 F.3d at 486.

Like the analysis under *Branti*, application of the *Vezzetti* factors suggests that Gordon, Thorsen, and Flick fall within the exception that the factors attempt to define. First, all three were exempt from civil service protection, which has been considered important by this circuit even before *Vezzetti* [5] *See Regan*, 984 F.2d at 580 ("New York has considered many of the same criteria for non-civil service status as does a court in determining whether a position is exempt from First Amendment protection."). Second, they all have technical

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[5] This circuit does not, however, presume employees are exempt from First Amendment protection just because they are exempt from civil service protection. *But see Stott v. Haworth*, 916 F.2d 134, 142 (4th Cir. 1990) (applying such a presumption). To presume one from the other, in our view, would be at odds with *Elrod*, where the plaintiffs were "non-civil-service employees." 427 U.S. at 351.

competence or expertise; each was a consultant to a specific policymaking board (Gordon to the Sewer Commission, Thorsen to the City Highway Department, and Flick to the Office of Community Development). The third-factor, in contrast, weighs in their favor, as each was not in charge of a large group of employees. *See Vezzetti*, 22 F.3d at 486 (noting that the plaintiff there "managed about sixty employees and had broad authority to make hiring decisions"). The remaining factors, in our view, together encompass a principle upon which this circuit has placed primary importance: whether the employee in question is empowered to act and speak on behalf of a policymaker, especially an elected official. *See Regan*, 984 F.2d at 580 ("There is no likely circumstance in which a shared ideology is more important than when an elected official appoints a deputy who may act in his or her stead."). The plaintiffs here negotiated contracts and litigated on behalf of the County, represented the County in committees made up of elected officials, and were charged to represent the County at hearings or in court. These last four *Vezzetti* factors attempt to define the contours of a zone inside which governmental decisions are made. The plaintiffs' advice to and representation of top policymaking officials in the County place them inside this zone.

However, we emphasize that *Vezzetti* should not be mechanically applied, nor should it begin and end the analysis. *See Vezzetti*, 22 F.2d at 486 (noting that the factors are not "an exhaustive list of indicators, nor is any one factor or group of them always dispositive"). Equally helpful is an examination of this circuit's cases applying *Elrod-Branti* analysis, which reveals that we have held a wide variety of jobs to be exempt from First Amendment protection. *See, e.g., Vezzetti*, 22 F.3d at 486 (Highway Superintendent); *Regan*, 984 F. 2d at 581 (Deputy Tax Receiver); *Savage*, 850 F.2d at 65 (Confidential Secretary to the Director of the County Correctional Facility); *id.* (Coordinator for Pre-Trial Release Services); *id.* (First Deputy Service officer for the County Veterans Service Agency).

The employees exempt from First Amendment protection in *Savage, Regan* and *Vezzetti* all worked closely with and exercised independent judgment in advising policymakers and elected officials. *See Savage*, 850 F.2d at 69 (noting that the secretarial position exempted from protection involved "confidentiality, discretion in disseminating information to the public, and independent judgment regarding department policies and procedures"). Here, as noted above, each of the three plaintiffs served as a liaison and advisor to a policymaking commission. It is difficult to fathom how such responsibilities can be undertaken and done well without their "political or social philosophy [making] a difference in the implementation of programs." *Id.*

Also persuading us are other circuits' cases concluding that government attorneys in similar positions to those held by the plaintiffs do not fall under the *Elrod-Branti* umbrella. "All circuit court decisions — and almost all other court decisions — involving attorneys in government service, other than public defenders, have held that *Elrod/Branti* do not protect these positions." Susan Lorde Martin, *A Decade of Branti Decisions*, 39 Am. U. L. Rev. 11, 46-47 (1989);[6] *see also Williams*, 909 F.2d at 155 ("[C]ourts that have decided whether city and county attorneys are so protected have almost uniformly found that they are not.").[7]

---

[6] In fact, Martin described an "employment spectrum," on which she places an employee who cleans the governor's mansion at one end (protected by *Elrod-Branti)* and "lawyers-other than assistant public defenders"-at the other (exempt from *Elrod-Branti* protection). *Id.* at 23. Cases holding government attorneys exempt from First Amendment protection against politically-motivated dismissal include *Williams*, 909 F.2d at 155; *Bauer*, 802 F.2d at 1063-64; *Livas v. Petka*, 711 F.2d 798, 800-01 (7th Cir. 1983); *Newcomb v. Brennan*, 558 F.2d. 825, 830-31 (7th Cir. 1977); *see also Williams*, 909 F.2d at 155 (listing cases, including district court and state court cases).

[7] Plaintiffs rely in part on three district court cases in this circuit. *Selkirk v. Boyle*, 738 F. Supp. 70 (E.D.N.Y. 1990), *Tavano v. County of Niagara*, 621 F. Supp. 345 (W.D.N.Y. 1985), *aff'd*, 800 F.2d 1128 (2d Cir. 1986), and *Layden v. Costello*, 517 F. Supp. 860 (N.D.N.Y. 1981), all found

(Footnote continued)

In *Williams*, the Sixth Circuit held that a City Attorney was not entitled to First Amendment protection. 909 F.2d at 153-56. While the position of City Attorney is certainly distinguishable from the Assistant County Attorneys at issue here, the court in *Williams* explicitly noted that even if Williams's tasks were "largely ministerial," First Amendment protection still would not apply because "the City Attorney could be employed by the City to give legal advice, to act as the City's solicitor, handling its litigation, to represent City officials in litigation, and to perform some of the City's prosecutions." *Id.* at 154-55.

The plaintiffs argue that they only gave technical legal advice, and did not make policy. We find two fatal flaws in this argument. First, the Supreme Court in *Branti* made it clear that the focus of the argument should not be whether an individual's employment carries the "policymaker" label, but rather whether "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. Therefore, the plaintiffs' consistent protests that they do not "make policy" are outweighed by the evidence that they can act in the stead of the County Attorney, performing all the tasks that the City Attorney could perform in *Williams*. Second, their argument that they "only gave legal advice" was rejected by the Third Circuit in *Ness v. Marshall*, 660 F.2d 517, 521-23 (3d Cir. 1981). There, the court held that the positions of City Solicitor and Assistant City Solicitor did not receive *Elrod-Branti* protection. *Id.* at 521. The court

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assistant county attorneys to be constitutionally protected under *Elrod* and *Branti*. Though *Tavano* was summarily affirmed by this court, the district court found that the employees there not only were not policymakers, but also were not terminated for political reasons. 621 F. Supp. at 350. Therefore, the district court's conclusion that the employees were entitled to First Amendment protection was not essential to its decision and carries no precedential weight. That we considered the district court's decision as turning on the factual question of whether the dismissals were politically motivated is made clear by the fact that we affirmed summarily. All three cases, aside from not controlling the outcome here, predate *Regan* and *Vezzetti*, which of course, are controlling on this court.

determined that despite the solicitors' argument that they performed only "purely technical legal work," the duties the solicitors *could* perform -- rendering legal opinions, drafting ordinances, [and] negotiating contracts -- define a position for which party affiliation is an appropriate requirement." *Id.* at 521-22. The *Williams* court echoed *Ness:* "The plaintiffs in *Ness* argued, unsuccessfully, that their jobs were politically neutral and essentially technical in nature; they merely gave legal advice when requested to do so. That argument did not succeed in *Ness* and it cannot prevail here." 909 F.2d at 155-56. Nor will it prevail here.

Our decision in *Regan* provides a compelling rationale for our ruling. The *Regan* court, emphasizing the importance of the plaintiff's ability to act on behalf of a policymaker, stated that "[e]lected officials are charged with carrying forth the mandate of the voting public, and in order to effectuate the policies promised the electorate, that official must be able to have trusted advisors and alternates who are directly accountable to that official." 984 F.2d at 580. Here, the County Attorney is not elected but rather appointed by the Legislature, which is itself elected. Gordon and Thorsen were both directly positioned as alternates to the County Attorney position. In addition, all three plaintiffs advised the Legislature or Commissions set up by the Legislature or County Executive, both of which are elected. Finally, the Legislature, which has perhaps the best knowledge of the responsibilities involved in the positions it created, designated these positions both as "policymaking"[8] and as exempt from civil service status. It is, in our view, a fair conclusion that the Assistant County Attorneys here, because of the discretion with which they are charged, and because of their authority to act on behalf of the

---

[8] Section 66-9 of the Rockland County Code requires that the legislature annually designate, by resolution, persons who hold "policy-making positions" in the County. Those persons are then subject to the financial disclosure requirements of the Code. The Resolution adopted by the Legislature pursuant to this law included plaintiffs' positions on the list of policymakers.

County, are politically accountable to the Legislature and the County Executive such that their loyalty helps ensure that the mandate of the electorate is effectively carried out.

We hold that the Assistant Rockland County Attorneys are, for the reasons set forth above, exempt from First Amendment protection against politically motivated dismissal. The judgment of the district court is therefore vacated. We remand with direction to enter judgment in favor of the defendant, the County of Rockland. Costs shall be assessed against the appellees.

Judgment REVERSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. MARTIN GORDON, ERIC OLE THORSEN and JOEL J. FLICK,

Plaintiffs,

-against-

COUNTY OF ROCKLAND, C. SCOTT VANDERHOEF and PAUL NOWICKI,

Defendants.

U.S. DISTRICT COURT S.D. OF N.Y. FILED W.P. SEP 04 1996

38

94 Civ. 7794 (CLB)

AMENDED JUDGMENT

Judgment # 96,0006wp

The issues in the above entitled action having been brought on for trial before the Honorable Charles L. Brieant, U.S.D.J., and a jury on December 20, 1995, and at the conclusion of the trial the jury having returned a verdict in favor of the plaintiffs and the court thereafter on January 12, 1996 directed the court to enter judgment as against defendant The County of Rockland in favor of plaintiffs Martin Gordon and Eric Ole Thorsen in the sum of $70,000.00 each and for plaintiff Joel J. Flick in the sum of $57,000.00 together with attorneys fees and costs in the sum of $26,465.42, for a total judgment of $223,465.42, it is,

ORDERED, ADJUDGED AND DECREED: That plaintiffs Martin Gordon and Eric Ole Thorsen have judgment as against the County of Rockland in the sum of $70,000.00 each and that plaintiff Joel J. Flick have judgment in the sum of $57,000.00 as against the County of Rockland, together with attorneys fees and costs in the sum of $26,465.42, for a total judgment of $223,465.42.

ORDERED, ADJUDGED AND DECREED: That plaintiffs' claim against C. Scott Vanderhoef and Paul Nowicki are dismissed in accordance with the Court's June 7, 1996 Order.

Dated: White Plains, New York
September 3, 1996

/s/ Charles Brieant
USDJ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RECEIVED APR 30 199? 43

----------x

S. Martin Gordon, Eric Ole Thorsen and Joel J. Flick,

Plaintiffs,

-against-

County of Rockland, C. Scott Vanderhoef And Paul Nowicki,

Defendants.

----------x

94 Civil 7794 (CLB)

#97,0120wp

JUDGMENT

U.S. DISTRICT COURT S.D. OF N.Y. FILED W.P. APR 28 1997

The issues in the above entitled action having been brought on for trial before the Honorable Charles L. Brieant U.S.D.J., with a jury on December 20, 1995, and at the conclusion of the trial on January 12, 1996, the jury having returned a verdict in favor of the plaintiff as against defendant the County of Rockland in the amount of $70,000.00 each for plaintiffs S. Martin Gordon and Eric Ole Thorsen, and in favor of plaintiff Joel J. Flick in the sum of $57,000.00 together with attorneys fees and costs in the sum of $26,465.42, for a total judgment of $223,465.42, and thereafter on April 25, 1997, the District Court having received a mandate from the United States Court of Appeals dated March 27, 1997, and said mandate reversed the District Court and directed the district court to vacate the judgments dated January 16, 1996, (#96,0006wp) and the amended judgment dated September 4, 1996, (#96,0086wp) and enter judgment in favor of the defendant the County of Rockland with costs to be assessed against the appellees in the amount of $2,434.60, it is,

ORDERED, ADJUDGED AND DECREED: That the judgments of the District Court dated January 16, 1996 and the Amended Judgment dated September 4, 1996 are hereby

vacated pursuant to the Mandate dated March 27, 1997. The complaint be and it is hereby dismissed as to all defendants. Costs in the amount of $2,434.60 is awarded in favor of the appellant County of Rockland as a against the appellee S. Martin Gordon, Eric Ole Thorsen and Joel J. Flick.

Dated: White Plains, N.Y.
April 28, 1997

/s/ James Parkison
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. MARTIN GORDON, ERIC OLE THORSEN AND JOEL J. FLICK

Plaintiffs,

- against -

THE COUNTY OF ROCKLAND, C. SCOTT VANDERHOEF AND PAUL NOWICKI

Defendants.

COPY

94 Civ. 7794 (CLB)

SPECIAL VERDICT

1. Do you find that the plaintiffs have proved by a preponderance of the credible evidence that they were terminated because of their political affiliation as defined by the Court by defendant C. Scott Vanderhoef alone or with others?
(Answer Yes of No)

   a. S. Martin Gordon ___Yes___

   b. Eric Ole Thorsen ___Yes___

   c. Joel J. Flick ___Yes___

2. Do you find that the plaintiffs have proved by a preponderance of the credible evidence that they were terminated because of their political affiliation as defined by the Court by defendant Paul Nowicki alone or with others?
(Answer Yes of No)

   a. S. Martin Gordon ___Yes___

   b. Eric Ole Thorsen ___Yes___

c. Joel J. Flick No

3. Do you find that Joel J. Flick has proved by a preponderance of the credible evidence that he was terminated because of his political affiliation as defined by the Court by Terry Grosselfinger alone or with others?
(Answer Yes of No)

Yes

4. For each plaintiff as to whom you answered "No" in questions 1, 2 and 3 above, report a verdict for the defendants. If you answered "Yes" in either question 1, 2 or 3 as to any plaintiffs, answer question 4 as to such plaintiff(s) only.

5. Do you find that the defendants have proved by a preponderance of the credible evidence that such termination was not a constitutional violation because party affiliation was an appropriate requirement for the effective performance of the public office of that plaintiff as defined by the Court?
(Answer Yes or No)

a. S. Martin Gordon No

b. Eric Ole Thorsen No

c. Joel J. Flick No

6. As to each plaintiff whom the jury answered "No" to the question posed in number 5, state the damages of each plaintiff in a single sum of money.

a. S. Martin Gordon
Amount of damages $ 70,000

b. Eric Ole Thorsen
Amount of damages $ 70,000

c. Joel J. Flick
Amount of damages $ 57,000

I certify that this form correctly reflects the unanimous verdict of the jury.

Dated: December 20, 1995
White Plains, New York

S/
FOREPERSON

ASSISTANT COUNTY ATTORNEY

DISTINGUISHING FEATURES OF THE CLASS: This is professional legal work of a complex legal nature involving the responsibility for representing the County in court cases and in the performance of other legal work. General supervision is received from the County Attorney. Does related work as required.

TYPICAL WORK ACTIVITIES:

Researches the law and renders opinions to the County Legislature and department heads as directed by the County Attorney;

Prepares pleadings, appeals, resolutions, notices, contracts and other legal papers and documents;

Examines legal papers served on or filed with County departments;

Appears in Court or at hearings to represent the County.

FULL PERFORMANCE KNOWLEDGES, SKILLS, ABILITIES AND PERSONAL CHARACTERISTICS: Good knowledge of the principles and practices of law, particularly as concerned with the organization and operation of County departments and agencies; ability to express arguments of the law by written and spoken words; ability to deal effectively with people; physical condition commensurate with the demands of the position.

MINIMUM QUALIFICATIONS: Possession of a license to practice law in the State of New York.

PLAINTIFF'S
EXHIBIT
14

Plaintiff's Exhibit 14

Supreme Court, U.S.
FILED
JUL 18 1997
CLERK

(2)

No. 96-1996

In The

Supreme Court of the United States

October Term, 1996

S. MARTIN GORDON; ERIC OLE THORSEN and JOEL J. FLICK,

Petitioners,

vs.

THE COUNTY OF ROCKLAND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, Rockland County, respectfully requests that this Court deny the petition for a writ of certiorari which seeks review of the Second Circuit's opinion below. That opinion is reported at 110 F.3d 886 (2d Cir. 1997) and is reprinted in the petition for certiorari at Appendix A.

STATEMENT OF THE CASE

Petitioners have grossly distorted the facts relevant to the powers, responsibilities and status of assistant county attorneys in Rockland County. As detailed below, the evidence plainly demonstrates that petitioners held confidential, policymaking positions and that party affiliation was an appropriate requirement for effective performance of their jobs. Therefore, there is no cause for this Court's review of the conclusion below that petitioners were not entitled to First Amendment protection from dismissal.

In Rockland County, assistant county attorneys are exempt from civil service protection (A246-48) and are designated by the Rockland County Legislature as "policymakers" for the purposes of financial disclosure. (A227). Assistant county attorneys serve at the pleasure of the county attorney and can have their appointments revoked by him at any time. (A239).

Under New York law, the county attorney appoints his assistants and, if more than one assistant is appointed, the county attorney must designate in writing a succession list detailing which assistants shall assume the powers and duties of the county attorney in the event of a vacancy. (A239). In 1993 and until March 1994, petitioners Eric Ole Thorsen and S. Martin Gordon were listed first and second on this list of succession (after the deputy county attorney) and petitioner Joel J. Flick was fifteenth. (A45-46).

The county attorney is Rockland County's "chief legal advisor." His powers and duties — which Messrs. Thorsen and Gordon were at the top of the list to exercise — include:

> The County Attorney may, upon the request of the governing body of any town, village, school district or special district and with the approval of the County Legislature, act as the legal advisor for such body. . . . The County Attorney shall also perform such other related legal functions as the County Legislature or the County Executive may designate in order to implement and accomplish the policies and responsibilities the County Legislature has prescribed.
>
> The County Attorney shall advise and represent all county officers and employees in relation to their official duties and, where in the interest of the county, prepare all necessary papers and written instruments in connection therewith; prosecute or defend all actions or proceedings of a civil nature brought by or against the county; when authorized by the County Legislature or the County Executive, prosecute and defend all proceedings of a civil nature brought against the County Legislature or any county officer or employee whose compensation is paid from county funds for any official act. . . . on request, prepare resolutions, ordinances, legalizing acts and local laws to be presented for action by the County Legislature, together with notices and other items in connection therewith; and perform such other and related

> duties as may be prescribed by law not inconsistent with the Charter or this code or by ordinance or resolution of the County Legislature.

(A240).

As assistant county attorneys, petitioners' official duties and responsibilities — as defined by Rockland County's Civil Service Rules — were as follows:

> DISTINGUISHING FEATURES OF THE CLASS:
>
> This is professional legal work of a complex legal nature involving the responsibility for representing the County in court cases and in the performance of other legal work. General supervision is received from the County Attorney. Does related work as required.
>
> TYPICAL WORK ACTIVITIES:
>
> Researches the law and renders opinions to the County Legislature and department heads as directed by the County Attorney;
>
> Prepares pleadings, appeals, resolutions, notices, contracts and other legal papers and documents;
>
> Examines legal papers served on or filed with County departments; Appears in Court or at hearings to represent the County.

FULL PERFORMANCE KNOWLEDGES, SKILLS, ABILITIES AND PERSONAL CHARACTERISTICS:

Good knowledge of the principles and practices of law, particularly as concerned with the organization and operation of County departments and agencies; ability to express arguments of the law by written and spoken words; ability to deal effectively with people; physical condition commensurate with the demands of the position.

MINIMUM QUALIFICATIONS:

Possession of a license to practice law in the State of New York.

(A222).

While their management styles differed, both the current County Attorney Paul Nowicki, a Republican, and his predecessor, Ilan Schoenberger, a Democrat, testified that they needed loyal and trusted assistant county attorneys to function effectively. For example, Mr. Schoenberger described assistant county attorneys as his "associates" who would do work under his name. (A157). He added that he wanted them to act "as lawyers" and treat the County as they would a private client. (*Id.*). Mr. Schoenberger acknowledged that he did not closely supervise the work of his assistants because he "trusted" them. (A158). He further testified that because assistant county attorneys had to interpret and follow his policies — at times without coming to him for authorization before speaking — he would not want to employ an assistant county attorney who he could not trust. (A161-63).

Like Mr. Schoenberger, Mr. Nowicki testified that he relies on his assistant county attorneys to use their expertise and skill in performing their responsibilities. (A191-92). Mr. Nowicki explained that he terminated Messrs. Gordon and Thorsen — as well as other assistant county attorneys who did not sue the County — because he wanted to produce an office that could work better with the new administration. (A180). Unlike Mr. Schoenberger, who testified he ran a very tight ship, Mr. Nowicki testified that he routinely delegates responsibilities to his assistants because they are "professionals" who do "whatever has to be done" to solve a problem or resolve a legal question. (A190-94).

Mr. Nowicki's testimony about how he runs his department was consistent with testimony of Rockland's County Executive, C. Scott Vanderhoef, concerning his administration's organizational strategy and how it differs from the philosophy of the prior administration. In this regard, Mr. Vanderhoef explained that the prior administration's strict hierarchical approach "did not allow managers to manage." His administration, however, employs total quality management which allows managers to take fuller responsibility for their departments and their actions. This strategy involves employees in most decision-making efforts, which results in "a decentralization of decision-making." (A181-82). With respect to the duties and responsibilities of assistant county attorneys, Mr. Vanderhoef testified that he expected them to do a thorough, competent and professional job. He also testified that assistant county attorneys advise him directly on health issues, personnel issues and tax questions. (A183).

In addition to petitioners, another assistant county attorney testified on their behalf. He testified that he is principally responsible for all matters within Rockland County that deal with personnel or labor issues and explained that this work

includes drawing up disciplinary charges and prosecuting the charges at disciplinary proceedings, arbitrations and other judicial proceedings. (A208-09; 212-14). He also gives legal advise to the board of trustees of Rockland Community College and meets with the Sheriff of Rockland County — an elected official — on a weekly basis. (A215-16). This assistant testified that his job duties: (a) were assigned to him at the discretion of the county attorney; and (b) could be assigned to a part-time assistant county attorney if the county attorney so desired. (A210-11).

1. *Mr. Gordon*

Mr. Gordon was an assistant county attorney from January 1978 until his termination in March 1994. Before working in the County Attorney's Office, he was a registered independent, but he changed his party affiliation to Democrat because "most of the people around him were registered Democrats." (A138). Before his termination, Mr. Gordon described his job duties and experiences as follows:

> My specialty is real property law. I handle commercial civil litigation and municipal law with emphasis on County law as it pertains to Article 5A. I have been handling the Rockland County Sewer District No. 1 affairs since January 1978. I have handled numerous Eminent Domain Procedure takings on behalf of the sewer district and I have handled negotiations on real property purchases and matters for the County Executive department.
>
> I regularly attend the sewer commission meetings held at least once monthly and in addition I attend those legislative committee

> meetings and meetings of the legislature when sewer commission matters are on the agenda. I am in the County attorney's office at least three times each week and I am in constant communication with the executive director of the sewer district, Ronald Delo, on an almost daily basis by phone or at the sewer district offices in Orangetown. In this respect I handle contractor problem issues, real property tax matters, negotiations with contractors on claims, negotiations with engineers, represent the sewer district with regards to NYS DEC litigations, advise on enforcement of industrial sewer code violations.
>
> I have some experience in electric utility matters, having handled the origination of the County's electric utility agency. I have been the liaison with Orange & Rockland as regards rates and low cost power through the New York Power Authority. I have also handled county contracts with regards to purchase of low cost gas purchase in bulk, through the public bidding process. I have testified on behalf of the county in several rate cases before the Public Service Commission.

(A220).

Amplifying on this personal job description, Mr. Gordon testified that he was expected to assist the County Sewer Commission in implementing the "wishes" or "directives" of the County Legislature. (A130). He also stated that he had the

authority, as counsel for the Sewer Commission, to initiate litigation without having to go to Mr. Schoenberger for permission. (A132). Moreover, Mr. Gordon acknowledged that he assisted the former county executive with respect to the condemnation and purchase of real estate. (A132-33). In these instances, Mr. Gordon attended meetings with the County Executive and spoke directly to him about these matters. (*Id.*) Mr. Gordon also acknowledged meeting with the current County Executive to discuss litigation involving a municipality within Rockland County. (A131).

While an assistant county attorney, Mr. Gordon aided a committee created by the Rockland County Legislature which was charged with the responsibility of forming a county electric agency. (A134-35). To accomplish this task, Mr. Gordon said he interacted with individuals in New York's state capital as well as other municipal electric utility agencies. (A135-36). Finally, Mr. Gordon testified that — at the request of Rockland's County Executive — he worked with counsel for a utility company to determine whether there was a way to reduce electricity rates for residents of Rockland County. He also acknowledged that at these meetings he was representing Rockland County. (A137).

2. *Mr. Thorsen*

Mr. Thorsen, a Democrat, was an assistant county attorney from February 1980 to June 1983. Thereafter, he was appointed deputy county attorney by the then Democrat-controlled County Legislature. (A140). Mr. Thorsen held this position until June 1993, when he decided to become a part-time assistant county attorney. (A141). He remained in this position until March 1994, at which point his employment was terminated.

At trial, Mr. Thorsen testified that he regularly provided general "lawyering" to the Highway Department and legal advice

to the County's Planning and Parks Agencies. (A142-45). Mr. Thorsen described the County's Planning Agency as being "largely concerned with future growth in Rockland County and making certain that we block out areas for parks and how county properties are to be developed in the future." (A145). He also acknowledged that politics and partisan influences played a role in that department's decisions. (A147).

Mr. Thorsen further testified that from time-to-time he acted as "legal counsel" to committees in the county legislature. Acting as such, he gave "legal opinions" when requested. (A148-49). While performing as "legal counsel," Mr. Thorsen drafted memoranda to chairpersons of the various County legislative committees as well as to the Superintendent of Highways. (A151-52). Mr. Thorsen admitted that legislators, who were elected officials, made inquiries of him regarding matters upon which he was working. (A154). Finally, Mr. Thorsen testified that during his last year of employment, he worked on the acquisition of property and helped to prepare contracts for public work. (A142-43). In these efforts, he was directed by the county legislature and the county executive. (A143).

3. *Mr. Flick*

Mr. Flick was first employed by the County in 1989 to help administer the Community Development Block Grant Program. (A165). Mr. Flick testified that the former county executive recommended him for this position. (A174). In January 1992, Mr. Flick was appointed as an assistant county attorney in Rockland County's Office of Community Development. He was the first attorney to staff the Office of Community Development and it was his job to ensure that: (a) federal grant monies were applied properly; and (b) communities seeking federal funds drafted their contracts in accordance with federal requirements.

(A167-69). Before working for the County, Mr. Flick was a Republican. He switched and became a Democrat soon after he started working on the Community Development Block Grant Program. (A123, 165).

The description for Mr. Flick's position includes the following duties and responsibilities:

> Reviews a variety of legal documents, rules and regulations for appropriateness, legality, proper form, applicability, etc.;
>
> Provides advice on a variety of legal matters, recommending proper course of action;
>
> Prepares a variety of legal documents, including contracts and resolutions;
>
> Represents the County of Rockland and meets with municipal officials for discussions, negotiations, clarifications, etc.; and
>
> Performs related work as assigned.

(A238).[1] In letters to the public, Mr. Flick described himself as "general counsel" of the Rockland County Community Development Agency. (A225).

---

1. Petitioners are wrong with their challenge to Rockland County's inclusion of a written description of Mr. Flick's duties in the record on appeal. This description was part of the County's summary judgment motion papers (A43) and was, therefore, properly part of the record in the court below. *See* Fed. R. App. P. 10(a); *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 638 (9th Cir. 1969).

Mr. Flick testified that he had "sole discretion" to determine whether municipal governments within the County were complying with federal law regarding community development and grant programs. (A172). He described these decisions as "unilateral" because he was the one who advised the municipal attorneys on what language they needed to include in their contracts to qualify for the grants. (A173). Mr. Schoenberger confirmed Mr. Flick's testimony on this point and added that Mr. Flick had "primary" contacts with elected officials to discuss the allocation of funds to various community development projects. (A160).

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

There is no reason for this Court to grant petitioners' application for a writ of certiorari because: (i) the question of whether assistant county attorneys are entitled to First Amendment protection from patronage dismissals is not an open issue and does not raise important legal questions for this Court's review; (ii) the decision below was a plainly correct application of settled law to uncontroverted facts; and (iii) there is no conflict between the decision below and any decision of this Court or any other circuit involving analogous positions.

I.

THE SECOND CIRCUIT'S DECISION DOES NOT RAISE AN IMPORTANT ISSUE THAT CALLS FOR THIS COURT'S REVIEW.

The precedents upon which the decision below turns are well-settled. In *Elrod v. Burns*, 427 U.S. 347, 373 (1976), this Court carved an exception to the general rule that patronage

dismissals violate the First Amendment and exempted employees in policymaking positions and those privy to confidential matters from First Amendment protection. *Id.* at 367. In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court refined the standard in *Elrod*:

> [T]he ultimate inquiry is . . . whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Id. at 518. (hereinafter the "*Branti* standard").

Though circuit courts have sometimes wrestled with the application of the *Branti* standard, the courts recognize "[t]his difficulty 'is the natural result of the myriad of governmental bodies, departments, and positions, and the varying responsibilities of public employees.' " *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993), *quoting Pounds v. Griepenstroh*, 970 F.2d 338, 341 (7th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993). With respect to attorney positions, however, the circuit courts are uniform in holding that government attorneys are not protected against politically motivated discharges. *See Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990); *Clark v. Brown*, 861 F.2d 66 (4th Cir. 1988); *Bauer v. Bosley*, 802 F.2d 1058 (8th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987); *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983); *Mummau v. Ranck*, 687 F.2d 9 (3d Cir. 1982); *Ness v. Marshall*, 660 F.2d 517, 522 (3d Cir. 1981).

This Court should not and need not review each of the decisions that comprise the progeny of *Elrod* and *Branti* as petitioners suggest because when it comes to government attorneys — like petitioners — who: (a) do not have civil service protection; (b) interact with elected officials; and (c) represent

governmental agencies in important matters, the circuit courts have had no difficulty applying the *Branti* standard to reach the conclusion that these high-level attorneys are not entitled to First Amendment protection. Thus, there is no open or important issue to review as evidenced by this Court's denial of certiorari in another high-ranking government attorney case. *See Bauer v. Bosley*, 802 F.2d 1058.

A. The Decision Below Is Not "Sweeping" And Does Not Create An Inappropriate *Per Se* Rule.

Petitioners completely mischaracterize the ruling below by calling it "broad," "sweeping" and one that "effectively creates a *per se* rule" whereby all municipal attorneys are foreclosed from First Amendment protection. Brief at 10.

The Second Circuit did not create a *per se* rule in its decision. To the contrary, the Second Circuit, applying the *Branti* standard, looked to the nature of the petitioners' jobs as well as the duties they performed and found that these positions were ones where party affiliation was an appropriate requirement for job performance. *Gordon*, 110 F.3d at 892. In reaching this conclusion, the court below noted, among other factors, that petitioners were: (i) privy to confidential information held by elected officials; (ii) charged with implementing policy of those officials; (iii) negotiated contracts and litigated on the County's behalf; (iv) represented the County in legislative committees; and (v) represented the County at hearings or in court. *Id.* at 888. Such duties can hardly be characterized as "ministerial functions" and other courts similarly have looked to these factors to decide that a position was not entitled to *Branti* protection. *See, e.g., Williams*, 909 F.2d at 154 (city attorney not protected under *Branti* because position entailed defending city against suits concerning policy disputes and negotiating for city in contract disputes); *Jiminez Fuentes v. Torres Gaztambide*, 807

F.2d 236 (1st Cir. 1986) (Regional Director of Urban Housing and Development Corporation not protected under *Branti* because such "confidential" employees participate in policy formation), *cert. denied*, 481 U.S. 1014 (1987); *Bauer*, 802 F.2d at 1062 (staff legal assistant to circuit court clerk not protected under *Branti* because position entailed representing circuit clerk in contract negotiations and judicial/administrative proceedings); *Ness*, 660 F.2d at 521-22 (city solicitor and assistant city solicitor not protected under *Branti* because positions entailed providing legal advice to mayor to implement policy).

The Second Circuit correctly found that petitioners held positions of a much higher level than they describe in their brief to this Court. Thus, the court below's factual finding that petitioners were not entitled to First Amendment protection from dismissal does not preclude other government attorneys from receiving constitutional relief if they are discharged. If the appropriate facts are established, such attorneys, according to the Second Circuit, are still entitled to protection. *See, e.g., Tavano v. County of Niagara*, 621 F. Supp. 345, 350 (W.D.N.Y. 1985) (First Amendment protected Family Court attorney because position entailed limited discretion and little contact with policymaker), *aff'd*, 800 F.2d 1128 (2d Cir. 1986).

The result below turned on the application of settled legal standards to facts which petitioners could not legitimately dispute. Disingenuously mischaracterizing this fact bound conclusion as a "*per se*" ruling does not entitle petitioners to review in this Court.

II.

THE SECOND CIRCUIT'S OPINION IS IN HARMONY WITH OTHER CIRCUITS REGARDING THE PROPER INTERPRETATION OF THE *BRANTI* STANDARD.

In a facile effort to invoke this Court's jurisdiction, petitioners attempt to create a conflict where none exists. Petitioners cite the decision below and four other cases as examples of rulings that allegedly have ignored the teachings of *Elrod* and *Branti* and allowed patronage dismissals for reasons other than party affiliation. Brief at 15-16. Petitioners' characterization of these cases is simply untrue. In all the cases cited by petitioners, the circuit courts are consistent in their reasoning. Each court correctly recognizes that the *Branti* standard is the ultimate inquiry. *See Akers v. Caperton*, 998 F.2d 220, 224 (4th Cir. 1993) (citing the *Branti* standard as the "established" outlines of the law); *Jiminez*, 807 F.2d at 239 (citing the *Branti* standard as the "dispositive issue"); *Tomczak v. City of Chicago*, 765 F.2d 633, 639 (7th Cir.) (citing the *Branti* standard as "the framework for the analysis"), *cert. denied*, 474 U.S. 946 (1985); *Barnes v. Bosley*, 745 F.2d at 501, 505 (8th Cir. 1984) (citing the *Branti* standard as "the criteria to be used"). And applying *Branti*, each court looks to whether party affiliation is an appropriate requirement of the job at issue by analyzing the duties inherent in the position as well as the actual duties performed by the plaintiffs in each case. *See Akers v. Caperton*, 998 F.2d at 224-25 (in determining whether party affiliation was an appropriate requirement for the effective performance of county highway maintenance superintendent position, looked to the duties the job entailed); *Jiminez*, 807 F.2d at 236 (in determining whether party affiliation was an appropriate requirement for the effective performance of a regional director, looked to whether the position related to partisan political interests); *Tomczak*, 765 F.2d at 642 (in

determining whether party affiliation was an appropriate requirement for the effective performance of first deputy commissioner position, looked to duties entailed by job); *Barnes*, 745 F.2d at 506 (same analysis for deputy circuit clerk). Thus, the cases upon which petitioners rely demonstrate the uniformity of the circuit court's application of the *Branti* standard which, in turn, means that there is no basis for review of the decision below.

Petitioners also spend much time emphasizing language from an Eleventh Circuit case involving employees of a county property appraiser's office as evidence of a conflict between the circuits. *Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1818 (1997). There is no conflict between *Parrish* and *Gordon* because both cases are consistent with this Court's teaching in *Branti*. *Gordon*, 110 F.3d at 886 ("applying principles set forth in . . . *Branti*"); *Parrish*, 86 F.3d at 1093 (recognizing the Branti standard as the "ultimate inquiry"). Although the court in *Parrish* stated that its decision "[parted] ways with those circuits that allow patronage dismissals in policymaking positions that do not directly implicate partisan political concerns," 86 F.3d at 1093, the two cases cited by the Eleventh Circuit fail to illustrate that point. *See Jiminez*, 807 F.2d at 245 (finding that Regional Directors of Urban Housing and Development perform duties that make their roles in government "sufficiently important"); *Tomczak*, 765 F.2d at 641 (finding that position of Deputy Commissioner of Water Department implicates partisan political concerns because politics plays a role in provision of services). Moreover, while they cite *Parrish* four times, petitioners fail to mention that this Court denied certiorari in *Parrish* almost two months ago. Rockland County respectfully submits that this Court correctly disposed of the petition in *Parrish* and should dispose of the petition at issue here in the same manner.

When faced with a *Branti* issue, "a court's function . . . is to do what courts are often called upon to do — to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served." *Jiminez*, 807 F.2d at 242. Petitioners fail to mention this crucial element of the *Branti* analysis. All of the cases cited by petitioners necessarily turn on the specific facts involved. Therefore, not a single case cited by petitioners can be in conflict with the decision below because not one of them involved government attorneys who performed similar duties. Instead, all the cases cited by petitioners involved carefully delineated and narrow interpretations of the *Elrod/Branti* doctrine to positions that bear no relationship to the assistant county attorney positions at issue here. Petitioners fail to address this important point because if they did, they would have to acknowledge that it is unnecessary for this Court to review their case.

A. The Second Circuit Correctly Analyzed Petitioners' Duties In Applying The *Branti* Standard.

Petitioners argue that review should be granted here because the Second Circuit's opinion only examined the inherent or "paper" duties of their positions and that this analysis violated this Court's ruling in *Branti*. Brief at 19. As with all their other arguments, however, this claim is based on a mischaracterization of the Second Circuit's analysis and a misreading of *Branti*.

The opinion below plainly says that *more* than petitioners' written job description were considered. Indeed, the Second Circuit expressly noted that "[e]ach of the [petitioners], of course, worked on tasks narrower than the broad charge contained in the written description." *Gordon*, 110 F.3d at 888. Moreover, the decision below specifically examined each of the petitioners' actual duties. In this regard, the court below observed that Mr. Gordon's actual duties included negotiating property

purchases and other contracts, assisting the Sewer Commission in implementing the County Legislature's wishes, advising the Commission on the legality of its actions, handling the origination of the County's electric utility agency, acting as a liaison between the Legislature and the utility companies, and litigating on behalf of the County. *Id.* at 888. In short, petitioners' argument that the Second Circuit looked only to the written descriptions of their positions is false.

Not only are petitioners wrong with respect to the factual underpinnings of the decision below, but their legal arguments about what this Court said in *Branti* is erroneous. In *Branti*, this Court, "having [ ] framed the issue" around the duties entailed in the particular position at issue, proceeded to analyze the "responsibilities" of the attorney position. *Branti*, 445 U.S. at 1295. Courts have interpreted this rule, as the court below did, to mean that both the powers inherent in the position and the duties actually performed should be considered. *See Peters v. Delaware River Port Auth. of Penn. and N.J.*, 16 F.3d 1346, 1353 (3d Cir.) (noting that analysis implicates "function[s] of the public office" as well as "actual duties performed"), *cert. denied*, 513 U.S. 811 (1994); *Waskovich*, 2 F.3d at 1297 (examined functions performed as well as inherent functions). Courts below have noted that "the actual past duties of the discharged employee are irrelevant if the position inherently encompasses more expansive powers and more important functions that would tend to make political affiliation an appropriate requirement for effective performance." *Peters*, 16 F.3d at 1353, *quoting O'Connor v. Steeves*, 994 F.2d 905, 911 (1st Cir.), *cert. denied*, 510 U.S. 1024 (1993). Therefore, in certain cases, courts need look no further than the inherent duties of the position at issue to apply the *Branti* standard. *See, e.g., Peters*, 16 F.3d at 1353. Whether the facts of a particular case require a court to look further than the duties inherent in a position is not the type of conflict this Court accepts for review.

Similarly, petitioners' attack on other Second Circuit decisions as being inconsistent with *Branti* is meritless. *Savage v. Gorski*, 850 F.2d 64 (2d Cir. 1988) and *Vezzetti v. Pelligrini*, 22 F.3d 483 (2d Cir. 1994), are consistent with *Branti* and have been relied upon by other circuits analyzing First Amendment claims. *See, e.g., Waskovich*, 2 F.3d at 1303 (citing Savage). In fact, three of the cases petitioners cite to support their arguments rely on *Savage* or *Vezzetti*. *Mumford v. Basinski*, 105 F.3d 264, 272 (6th Cir. 1997) (relying upon two factors also articulated in *Vezzetti*; *Peters*, 16 F.3d at 1353 (relying upon two factors articulated in *Vezzetti*); *Waskovich*, 2 F.3d at 1303 (relying upon a factor articulated in *Savage*).

Petitioners' contention that the Second Circuit in *Savage* "explicitly departed from this Court's instruction that party affiliation . . . should govern the propriety of politically-motivated personnel decisions," Brief at 13, is based on a false reading of *Branti*. This Court has never held that party affiliation should "govern the issue." On the contrary, this Court has instructed that the *nature* of the position should govern the issue. *See, e.g., Peters*, 16 F.3d at 1354 (noting that this Court "has directed that we focus on the nature of the responsibilities of the particular position in question"). Hence, patronage dismissals are permitted when the position is one in which party affiliation is an appropriate requirement for job performance as cases petitioners cite aptly establish. *See Mumford*, 105 F.3d at 27; *Peters*, 16 F.3d at 1353; *Waskovich*, 2 F.3d at 1297; *McConnell v. Adams*, 829 F.2d 1319, 1323 (4th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988).

Petitioners' attacks on the Second Circuit's holding in *Vezzetti* also are based on distortions of the holding in that case as well as the holding in *Branti*. The Second Circuit in *Vezzetti* considered whether a highway superintendent was protected from patronage dismissal. *Vezzetti*, 22 F.3d at 485. In making

this determination, eight factors were noted as being useful in deciding whether a position is one where party affiliation an appropriate requirement. *Id.* at 486. Petitioners' claim that the Second Circuit significantly narrowed *Branti* by listing these factors and "created an exception that has now effectively swallowed the rule against patronage dismissals." This claim is absurd for two reasons. *One*, petitioners fail to acknowledge that the Second Circuit stated in *Vezzetti* and again in *Gordon* that this list of factors is "not an exhaustive list of indicators, nor is any one factor or group of them always dispositive." *Gordon*, 110 F.3d at 890, *quoting Vezzetti*, 22 F.3d at 486. By suggesting factors to be considered when analyzing a *Branti* question, the Second Circuit is assisting lower courts, not narrowing *Branti* in any way. *See Jiminez*, 807 F.2d at 241 ("as courts have addressed the [Branti issue], they have shed light on useful approaches"). *Two*, the "factors" analysis employed by the court below in *Vezzetti* and *Gordon* has been relied upon in cases cited with approval by petitioners. *See, e.g., Mumford*, 105 F.3d at 272; *Peters*, 16 F.3d at 1353.

B. There Is No Conflict Between The Second Circuit And The Other Circuits As To Whether The *Branti* Issue Is One Of Law Or Fact.

Petitioners maintain that this Court should grant the petition to settle an inter-circuit conflict as to whether the *Branti* question is one of law or one of fact. An analysis of the cases reveals, however, this argument, like the others advanced by petitioners, is meritless.

The district court in *Gordon* submitted two issues to the jury: (1) whether petitioners were terminated for political reasons; and (2) whether those terminations were constitutional violations. The Second Circuit held that this second issue, the constitutional question, based on certain undisputed facts was a

question of law. Therefore, it properly found that the district court erred in submitting the question to the jury. *Gordon*, 110 F.3d at 887.

In *Branti*, this Court instructed that the ultimate issue in a political termination case is whether, taking into account the specific facts of the particular situation, party affiliation is an appropriate requirement for the effective performance of the position involved. *Branti*, 445 U.S. at 518. The circuit courts, including the court below, consistently have viewed this question as "one in which a mixture of historical facts to be determined by the trier of fact and a test of constitutional law is involved." *Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985); *see also Mumford*, 105 F.3d at 270 (finding as matter of law that position was "not protected by the First Amendment"). In other words, in certain cases both questions of fact and law will exist — the nature of the job at issue may involve issues of fact — but the ultimate constitutional question is one of law. Petitioners fail to see this important distinction in the cases.

The Second Circuit's decision in *Gordon* falls in line with the other appellate courts that have addressed this issue and held that patronage dismissal of similar government attorneys, other than assistant public defenders, did not violate the First Amendment. *See, e.g., Bauer*, 802 F.2d at 1062 (staff legal assistant in Office of Clerk of Circuit Court); *Brown v. Trench*, 787 F.2d 167, 169-70 (3d Cir. 1986), *aff'd*, 829 F.2d 30 (1987) (city solicitor and assistant district attorney); *Livas*, 711 F.2d at 800-01 (public prosecutor); *Ness v. Marshall*, 660 F.2d at 522 (city solicitor and assistant solicitor); *Mummau v. Ranck*, 531 F. Supp. 402, 404-05 (E.D. Pa.) (assistant district attorney), *aff'd per curiam*, 687 F.2d 9, 10 (3d Cir. 1982); *Bavoso v. Harding*, 507 F. Supp. 313, 316 (S.D.N.Y. 1980) (corporation counsel); *Montaquila v. St. Cyr*, 433 A.2d 206, 210 (R.I. 1981) (solicitor and assistant solicitor).

Petitioners do not argue that the Second Circuit erred in its factual determinations about their positions as assistant county attorneys. Rather, they claim that the constitutional question regarding their termination must always be a question of fact. Merely restating petitioners' argument demonstrates its fatal flaw. When dealing with high-level government attorneys, the nature of the position can present questions of law appropriate for the court's determination. For example, in *Bauer v. Bosley*, the Eighth Circuit found that the nature of the position at issue was clear from the record and that, therefore, it was unnecessary and error for the district court to submit the question to the jury. *Bauer*, 802 F.2d at 1062. Conversely, in *Soderbeck v. Burnett County*, the Seventh Circuit found that the question regarding the nature of a position within a sheriff's office was sufficiently uncertain as to render it a question of fact for the jury. *Soderbeck v. Burnett County*, 752 F.2d 285, 288 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985). In *Delong v. United States*, 621 F.2d 618, 623 (4th Cir. 1980), the Fourth Circuit employed the same analysis and found that the issue "may be resolved as one of law or fact depending upon the evidence adduced" *and* remanded the case for reconsideration in light of this Court's ruling in *Branti*.

C. The Second Circuit's Decision Does Not Conflict With The Ninth Circuit's Decision In *Finkelstein v. Bergna*.

Petitioners urge this Court to grant the petition to settle an alleged conflict between the Second and Ninth Circuits as to the proper determination of whether an assistant county attorney/ prosecutor is exempt from First Amendment protection from dismissal. Petitioners' reading of the Ninth Circuit's opinion in *Finkelstein v. Bergna*, 924 F.2d 1449 (9th Cir.), *cert. denied*, 502 U.S. 818 (1991), misses the mark.

In *Finkelstein*, the Ninth Circuit considered whether a

deputy district attorney was entitled to First Amendment from suspension solely because he exercised his right to free speech. In deciding whether the defendant district attorney was entitled to qualified immunity for his action against the plaintiff, the Ninth Circuit found it was not clear that prosecutors were protected from such disciplinary action. *Id.* at 1453. The Ninth Circuit cited both *Elrod* and *Branti* in reaching this conclusion, but relied on *Connick v. Myers*, 461 U.S. 138 (1983) to reach its result. *Id.* Indeed, the language in *Finkelstein* upon which petitioners place much reliance is dicta from the Ninth Circuit about the absence of a reference to *Branti* when this Court addressed the First Amendment issue presented in *Connick*.

Petitioners' reliance on *Finkelstein* and *Connick* is clearly erroneous. Petitioners have never alleged that they were terminated for exercising their right to free speech. Thus, the questions addressed by this Court in *Connick* and the Ninth Circuit in *Finkelstein* are wholly irrelevant to the issues addressed by the court below in this matter. *Branti* simply has no bearing on the First Amendment right to speech and public employees. The case at issue here involves the dismissal of confidential, policymaking employees whose party affiliation relates to job performance. This case is not about dismissal as a result of speech. Accordingly, there is no conflict between *Finkelstein*, a case that involves an assistant district attorney dismissed because of his speech and *Gordon*, a case that concerns assistant county attorneys dismissed because of their political affiliations.

CONCLUSION

It is clear from the facts and law discussed above that the decision of the Second Circuit was correct and not in conflict with any decision of this Court or with any other circuit. No intercession by this Court is necessary. Therefore, the petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

S. MARTIN GORDON; ERIC OLE THORSEN
and JOEL J. FLICK,

Petitioners,

vs.

THE COUNTY OF ROCKLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 96-1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

S. MARTIN GORDON; ERIC OLE THORSEN
and JOEL J. FLICK,

Petitioners,

vs.

THE COUNTY OF ROCKLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Although the jury expressly concluded that petitioners' "party affiliation was [not] an appropriate requirement for the effective performance of the public office" (App. 19), respondent improperly re-argues the facts in an attempt to "prove" petitioners were "high level" municipal attorneys and held "confidential, policymaking positions." Resp. Brief at 1, 13.

Respondent accuses petitioners of "grossly distort[ing] the facts." Resp. Brief at 1. In fact, petitioners have cited from the record, which is consistent with the jury's inherent finding that they lacked discretionary or policymaking duties and

would have competently performed under a Democratic or Republican administration.

In contrast, it is respondent who misquotes the record to argue that petitioners held political jobs exempted from First Amendment protection.

First, respondent states that the County Attorney, Paul Nowicki, "explained" that he terminated petitioners "because he wanted to produce an office that could work better with the new administration." Resp. Brief at 5 (citing A-180). In fact, respondent is really citing the testimony of the County Executive, C. Scott Vanderhoef, who was quoting Nowicki's hearsay statements. A-180). Vanderhoef testified that he could neither recall (1) if Nowicki had so advised him nor (2) what they discussed about petitioners. (SA-274). Vanderhoef also testified that Nowicki wanted petitioners terminated on account of their job performance. *See*, SA-276 ("[Nowicki's] view was we could do better having three other individuals in those particular positions, better for performance")(SA-275-76). Although the jury rejected this explanation, Vanderhoef made clear that — contrary to respondent's position on appeal — respondent was not contemporaneously concerned with petitioners' political incompatibility.

Indeed, the jury verdict is consistent with Nowicki's testimony that his assistants were professionals who would do "whatever has to be done" to solve a legal problem. (Resp. Brief at 5). That testimony reflects a non-political, results-oriented lawyering style that petitioners were qualified to handle. *See also,* A-183 (Vanderhoef testified that he relied on assistant county attorneys to do a thorough, competent and professional job).

Respondent also asserts that petitioners held policymaking positions since Nowicki's Democratic predecessor, Ilan Schoenberger, listed Tarsen and Gordon second and third in the line of succession. Resp. Brief at 1. In fact, the County Attorney was required to list deputies (as opposed to assistants) who can serve in his stead. (A-241-42). Schoenberger listed one deputy, Patricia Zugibe. (A-45). Listing petitioners

as assistants bears no relevance to their discretionary or policymaking authority. In fact, Nowicki, a Republican, retained Zugibe, a Democrat, as his deputy. (A-243) He himself apparently believed he could meet his needs in a non-political manner.

Finally, respondent continues to represent that Flick worked under a broad job description despite its failure to refute his consistent denials that it covered him. *Compare,* Resp. Brief at 10, with Petition at 6-7. In fact, Flick's duties -- assuring that local contracts complied with federal rules and regulations -- were neither discretionary nor political. Petition at 6-7.

ARGUMENT

POINT I

THE SECOND CIRCUIT OPINION EFFECTIVELY FORECLOSES GOVERNMENT ATTORNEYS FROM *ELROD-BRANTI* PROTECTION

In asserting that petitioners were high-ranking attorneys who performed policy-making duties, respondent argues that the decision below was not so sweeping as to exempt attorneys from First Amendment protection. However, since the Second Circuit (1) grounded its holding on job duties common to nearly all government attorneys although (2) the jury expressly concluded that petitioners' "party affiliation was [not] an appropriate requirement for the effective performance of the public office" (App. 19), petitioners are hard-pressed to imagine what First Amendment protection remains for other government lawyers who, like themselves, are not vested with discretionary or policymaking duties.

In its brief, respondent does not address the jury's express factual determination. Respondent also fails to defend the Second Circuit's sweeping and conclusory finding that "[i]t is difficult to fathom how [functioning as a liaison and advisor to a policymaking commission] can be undertaken and done well without their 'political or social philosophy [making] a difference in the implementation of programs.'" App. 10 (first

modification supplied) (citation omitted). The Circuit Court ignored this Court's counsel that (1) governmental officials may secure the loyal implementation of policy by dismissing *high level* employees holding contrary political views. *See*, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74 (1990). The court below also ignored this Court's statement that mutual confidence and trust can exist between attorneys of competing political parties. *Branti v. Finkel*, 445 U.S. 507, 520, n.14 (1980).

Moreover, the conclusion that competent government attorneys cannot put aside their party affiliation and faithfully represent a municipality on such non-political matters as highways, sewers, parks and government contracts suggests that the Second Circuit has effectively exempted *all* government attorneys from the First Amendment's reach, not just high-ranking lawyers vested with discretionary and policy-making duties.[1] Although petitioners' written job descriptions resemble those of other low-level government attorneys and required them to represent the municipality's interests, respondent did not -- and could not -- establish that there was a "Republican" as opposed to "Democratic" way for petitioners to discharge their responsibilities.

Finally, respondent misreads the decision below as concluding that petitioners' "positions were ones where party affiliation was an appropriate requirement for job performance." Resp. Brief at 13 (citing *Gordon v. County of Rockland*, 110

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[1] Citing *Tavano v. County of Niagara*, 621 F.Supp. 345 (W.D.N.Y. 1985), *aff'd* 800 F.2d 1128 (2d Cir. 1986) (table), respondent argues that the Second Circuit will protect government attorneys "if the appropriate facts are alleged." Resp. Brief at 14. However, the Second Circuit expressly distinguished *Tavano* on the ground that the district court's conclusion that the plaintiffs were entitled to First Amendment protection was not essential to the decision "and carries no precedential weight." App. 10-11, n.7. The Second Circuit affirmed summarily since the decision turned on the factual issue of whether the terminations were politically motived. Also, the Second Circuit noted that *Tavano*, a district court decision, predated binding circuit opinions that informed the decision below. *Id.*

F.3d 886, 892 (2d Cir. 1997)). The Second Circuit did not frame the issue that way; rather, it concluded that, "because of the discretion with which they are charged, and because of their authority to act on behalf of the County, [petitioners] are politically accountable to the Legislature and the County Executive that their loyalty helps ensure that the mandate of the electorate is effectively carried out." *Gordon*, 110 F.3d at 892. As the certiorari petition makes clear, the Second Circuit has departed from *Branti* and applied a "shared ideology" rather than "political party affiliation" test to determine whether the First Amendment protects a government plaintiff from patronage termination. The Second Circuit's test more narrowly construes the First Amendment and reflects an inter-circuit conflict that this Court should settle. *See, Point II, infra.*

POINT II

THE DECISION BELOW REVEALS AN INTER-CIRCUIT SPLIT AS TO THE PROPER APPLICATION OF *BRANTI*

Respondent states inaccurately that the Second Circuit has not split with other circuits over *Branti*'s proper application. This is not so. Some circuits are faithful to *Branti* and ask whether "*party affiliation* is an appropriate requirement for the effective performance of the public office involved. *Branti*, 445 U.S. at 518 (emphasis supplied). Others, like the Second Circuit, frame this threshold inquiry more broadly and make it easier for government employers to effect patronage terminations. *See*, App. 8 ("In *Savage*, we interpreted *Branti* to mean that 'political affiliation is an appropriate requirement when there is a rational connection between *shared ideology* and job performance'") (citing *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988)) (emphasis supplied). The Eleventh Circuit has expressly recognized this inter-circuit conflict. *See*, *Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996).[2] The

[2] In defending the Second Circuit's patronage cases, respondent argues that the so-called "*Vezzetti* factors" are intended to assist lower courts and do not limit *Branti*. Resp. Brief at 20. However, respondent does not

(Footnote continued)

Second Circuit departed from this Court's clear instruction that party affiliation, not ideology, controls the propriety of patronage terminations. *Id.*

Respondent's attempts to minimize this inter-circuit conflict are not persuasive. The certiorari petition cites opinions from the First, Fourth, Seventh and Eighth Circuits which have applied the broad test adopted by the Second Circuit. Pet. at 15-16. Although, as respondent notes, these circuits recognize *Branti* as controlling authority, they have restricted its application by asking whether shared ideology, as opposed to party affiliation, bears any relevance to effective job performance. *See, i.e.*, *Akers v. Caperton*, 998 F.2d 220, 225 (4th Cir. 1993) ("[w]e conclude that there is no rational connection between shared ideology and the performance of this low-level job"); *Jiminez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986); *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985); *Barnes v. Bosley*, 745 F.2d 501, 508 (8th Cir. 1984).

The Eleventh Circuit has recognized that these different tests are not merely semantic. *See*, *Parrish*, 86 F.3d at 1093 ("In reading *Branti* this way, we fall into line with those circuits interpreting *Branti* as teaching that party affiliation must be essential to effective performance of a position before an employee holding that position can be susceptible to patronage dismissal. . . . We part ways with those circuits that allow patronage dismissals in policymaking positions that do not directly implicate partisan political concerns") (citations omitted).

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address petitioners' position that several of the factors either directly contradict *Branti* or apply to nearly every public employee who holds a non-competitive position. *See*, Petition at 14. Critically, the Second Circuit expressly designed the *Vezzetti* factors "to determine whether 'there is a rational connection between shared ideology and job performance.'" *Vezzetti v. Pellegrini*, 22 F.3d 483, 486 (2d Cir. 1994) (citations omitted). As petitioners have emphasized, that test departs from *Branti*'s counsel and sets the Second Circuit apart from other circuits.

Critically, while challenging petitioners' argument that the circuits have inconsistently applied *Branti*, respondent has not addressed their contention that, had the Second Circuit faithfully applied that case, it would not have reversed the district court. Specifically, the Second Circuit would not have credited respondent's argument that it could fire petitioners to obtain loyal assistant county attorneys to effectuate the electorate's mandate. App. at 12-13. This reasoning does not address the *Branti* test: whether party affiliation affected petitioners' job performance. *Branti*, 445 U.S. at 518. Rather, it satisfies the Second Circuit's test which expressly modified *Branti* — whether shared *ideology* relates to effective job performance. *See*, *Savage*, 850 F.2d at 68.

As the Second Circuit (1) has departed from *Branti*'s test governing the propriety of patronage dismissals and (2) conflicts with other circuits for which political affiliation, not ideology, is the touchstone, certiorari is proper.

POINT III

THE DECISION BELOW REVEALS AN INTER-CIRCUIT SPLIT AS TO WHETHER ACTUAL OR INHERENT JOB DUTIES CONTROL THE *ELROD-BRANTI* INQUIRY

Respondent attempts to hide the inter-circuit split on the issue of whether courts should resolve the *Elrod-Branti* inquiry by examining actual and "paper" job duties.

First, respondent incorrectly argues that the Second Circuit examined all of petitioners' duties, actual and inherent. In fact, the court considered only their inherent duties, stating, "[t]he idea that job performance (rather than job description) should control *Elrod-Branti* analysis has been consistently rejected by this court and others. Instead, as this authority makes clear, this court's challenge is to discern the *duties inherent* in the offices held by the plaintiff." App. 4-5 (citations omitted) (emphasis in original). In stating the issue on appeal, the Court only cited "[t]he essential nature of these last three duties," that is, "representing the County, meeting

with municipal officials, and preparing legal documents, including contracts and resolutions." App. 5.

Respondent concedes that, in *Branti*, this Court examined all of the plaintiff's job duties before determining that the First Amendment protected an assistant public defender from patronage dismissal. Resp. Brief at 18. *Branti* makes clear that courts should consider the plaintiff's actual duties, not merely inherent ones, as the issue is whether "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective *performance of the public office involved.*" *Id.* at 518 (emphasis supplied). This Court did not qualify or limit the meaning of "performance" and the Second Circuit should have read it expansively and examined all of petitioners' job duties, inherent *and* actual. In failing to do so, the Second Circuit has departed from *Branti* and created an inter-circuit split that stands ripe for Supreme Court review.

POINT IV

THIS COURT SHOULD SETTLE AN INTER-CIRCUIT SPLIT AS TO WHETHER THE *ELROD-BRANTI* INQUIRY IS A QUESTION OF FACT OR LAW

Try as it might, respondent cannot sidestep another split which the Second Circuit exposes: whether analysis of *Elrod-Branti* protection is one of fact or law. As the certiorari petition makes clear, the circuits have split on this issue. While the Second Circuit reviewed the record *de novo* despite a jury verdict that respondent unconstitutionally terminated petitioners, the Fourth, Fifth, Seventh and Eighth Circuits let the fact-finder determine whether political affiliation relates to job performance. *See*, *Bauer v. Bosley*, 802 F.2d 1058, 1062 (8th Cir. 1986); *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 288-89 (7th Cir. 1985) and *Stegmaier v. Trammel*, 597 F.2d 1027, 1034 n.8 (5th Cir. 1979); *Delong v. United States*, 621 F.2d 618, 623 (4th Cir. 1980).

In defending the opinion below, respondent states that petitioners were high-level government attorneys and the

Second Circuit could easily determine whether their job duties required political allegiance to the county. Resp. Brief at 22. In fact, the record points in only one direction: petitioners executed non-policymaking, ministerial duties and, as the jury expressly concluded, party affiliation was not an appropriate requirement for effective job performance. (App. 19) (verdict sheet). The jury verdict inherently establishes that the district court could not resolve this issue as a matter of law. As respondent concedes, "sufficiently uncertain" facts made the *Elrod-Branti* inquiry a jury question. Resp. Brief at 22 (citing *Soderbeck*, *supra*).

As the Eighth Circuit has noted, a jury's determination that *Elrod-Branti* protects a government position has practical consequences since framing the issue as factual, not legal, compels the appellate court to review the record deferentially. *Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985) (citing Fed.R.Civ.P. 52(a)). By taking this question from a jury which ruled in petitioners' favor, the Second Circuit has split from the other circuits and ripened this issue for Supreme Court review.

POINT V

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH A NINTH CIRCUIT DECISION WHICH CITED *ELROD-BRANTI* TO HOLD THAT GOVERNMENT ATTORNEYS MAY SECURE FIRST AMENDMENT RELIEF

The decision below also conflicts with a Ninth Circuit ruling that government lawyers are not *per se* exempt from the constitutional protections against discipline motivated by First Amendment activity. *See*, Petition at 24-25 (citing *Finkelstein v. Bergna*, 924 F.2d 1149 (9th Cir. 1991).

Finkelstein and the instant case are irreconcilable. *Finkelstein* cited *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti* to "reject the proposition that prosecutors have unfettered discretion to discipline assistant prosecutors for exercising their first amendment rights." *Id.* at 1453. This language offers

guidance in the context of qualified immunity defenses and establishes an inter-circuit split as to whether municipal attorneys enjoy free association rights. While respondent reads *Finkelstein* as a disciplinary retaliation case governed by *Connick v. Meyers*, 461 U.S. 138 (1983), in fact, Finkelstein invoked the First Amendment after his supervisor punished him for political activity, not the kind of alleged misconduct that would implicate *Connick*'s scheme weighing an employee's public speech against the need for office efficiency. *See*, *Finkelstein*, 924 F.2d at 1451 ("Finkelstein alleges that the suspension, and its announcement at a press conference, were intended to thwart his bid for office").

As *Finkelstein* conflicts with the decision below, this Court should settle the issue whether the First Amendment prohibits retaliation against government attorneys who suffer retaliation on account of their political association.

CONCLUSION

This Honorable Court should grant certiorari.

Dated: August 6, 1997
Goshen, New York

Respectfully submitted,

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